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## **Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of *Lucas v. South Carolina Coastal Council* on Wetlands and Coastal Barrier Beaches**

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HAS THE U.S. SUPREME COURT FINALLY DRAINED  
THE SWAMP OF TAKINGS JURISPRUDENCE?:  
THE IMPACT OF *LUCAS V. SOUTH CAROLINA*  
*COASTAL COUNCIL* ON WETLANDS AND COASTAL  
BARRIER BEACHES

Hope M. Babcock\*

Law is the foundation on which property rests and is, therefore,  
the formal expression of a community's relationship to nature.<sup>1</sup>

I. INTRODUCTION

The Fifth Amendment of the United States Constitution bars the government from "taking" private property for public use without just compensation.<sup>2</sup> The Takings Clause of the Fifth Amendment thus acts as a restraint on the government's use of its "police power" authority to appropriate and regulate private property, and functions as an important screen protecting individual liberty from governmental intrusions.<sup>3</sup> The language of the Takings Clause appears clear and deceptively simple, but applying that language has proven to be extremely troublesome for the U.S. Supreme Court.<sup>4</sup>

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1. William J. Cronon, *Kennecott Journey*, in *UNDER AN OPEN SKY: RETHINKING AMERICA'S WESTERN PAST* 43 (William J. Cronon et al. eds., 1992).

2. The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

3. For somewhat contrasting views of the role of property as a protector of all other constitutional rights, see Carol M. Rose, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 10 CONST. COMMENTARY 238 (1993) (reviewing James W. Ely, Jr., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992) and Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187 (1992) [hereinafter Epstein, *Property*]).

4. For some examples of critical commentary on the muddle of the modern takings

In 1991, attention focused on a pending challenge to the constitutionality of a state statute preventing beachfront property owners from developing their land and on whether the Supreme Court might use the case to clarify the takings doctrine.<sup>5</sup> This Article will not address the question of whether the Court in fact clarified takings law in *Lucas v. South Carolina Coastal Council*.<sup>6</sup> It will focus only tangentially on the vociferously debated question of the extent to which the decision has changed the regulatory takings doctrine first announced by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.<sup>7</sup> This discussion focuses on the *Lucas* decision's

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doctrine, see Frank L. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of the "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax, *Takings*]; Susan Rose-Ackerman, *Against Ad-Hockery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988). For a concise, well-structured view of the takings doctrine, see Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990) (arguing that property and its regulation are aligned in overlapping evolutionary relationships) [hereinafter Rose, *Property Rights*]. For a fresh perspective on takings jurisprudence, see Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (re-animating phrase "for public use" as better yardstick for determining when compensation is required) [hereinafter Rubenfeld, *Usings*].

5. The Court granted review of several property cases in the 1991 Term, but only *Lucas* resulted in a major discussion of the takings doctrine as it relates to this Article. See *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992) (holding that mobile home rent control law was not physical taking of landowner's property); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991) (holding that agency did not violate substantive due process under § 1983 when it refused to process company's construction drawings), *cert. granted*, 112 S. Ct. 414 (1991), *cert. dismissed*, 112 S. Ct. 1151 (1992). The Court denied *certiorari* in *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (affirming that city ordinance conditioning nonresidential building permit on payment of fee to offset burdens caused by low income workers does not effect taking), *cert. denied*, 112 S. Ct. 1997 (1992).

6. 112 S. Ct. 2886 (1992).

7. 260 U.S. 393 (1922). For some examples of commentaries maintaining that the Court muddled the takings doctrine in the *Lucas* decision, see William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393 (1993) (criticizing majority opinion for, among other things, incorporating nuisance doctrine into takings jurisprudence); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993) (stating that *Lucas* addresses small universe of takings cases, does not deal with partial or temporary restrictions on land use, and backs off strict *per se* rule); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955 (1993) (stating that substantive opinions cannot break free of implicit assumption that any coherent account of Takings Clause must allow political processes of land use planning and of economic regulation to proceed) [hereinafter Epstein, *Seven Deadly Sins*]. See also Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279 (1992) (stating that *Lucas* rule does not identify regulations that are functionally equivalent to government land acquisitions). For the view that *Lucas* brought much-needed and long-awaited guidance on the topic, see Robert M. Washburn, *Land Use Control, the Individual, and*

reliance on the common law to provide a set of guidelines by which the constitutionality of governmental exercise of regulatory authority can be measured.<sup>8</sup> Much has been written about the *Lucas* Court's reliance on the common law of nuisance as an exception to the rule that real property owners must be compensated when all economically beneficial use of their property has been extinguished.<sup>9</sup> This Article, however, concentrates on the Court's reference to "background principles of the State's law of property" as a rationale for compensation. Specifically, the Article examines the effect of the *Lucas* Court's infusion of common law property doctrines into the takings debate over environmental regulations, focusing in particular on regulations protecting wetlands and coastal barrier beaches. The starting point of the Article is the following excerpt from the Court's opinion:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.<sup>10</sup>

This Article argues that the Court's reliance on the law of property neither creates an internal inconsistency in takings law nor necessarily leads to further destruction of natural resources. Background principles of property law, such as custom and public trust, have long provided a basis for government protection of the public's interest in certain types of land, like the barrier beach David Lucas sought to develop.<sup>11</sup>

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*Society*: *Lucas v. South Carolina Coastal Council*, 52 MD. L. REV. 162 (1993). And for the opinion that the decision will have little if any effect on the constitutionality of environmental regulations, see Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439 (1993) [hereinafter Sugameli, *Sound and Fury*].

8. One takings scholar refers to these common law doctrines as a "title penumbra," David J. McCarthy, Jr., *Ruminations on Regulation and the Takings Clause*, 5 HOME RULE & CIVIL SOC'Y 27, 63 (1994).

9. See, e.g., John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993) [hereinafter Humbach, *Nuisance*].

10. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

11. Carol Rose takes this argument one step further, arguing that the concept of property includes "a normative 'deep structure'" that includes qualities of restraint and responsibility which form the basis of a sound environmental ethic. See Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 28 (1994) [hereinafter Rose, *Environmental Ethics*]; see also *infra* part III.B.

Thus, the *Lucas* case need not be perceived as casting a constitutional cloud over laws protecting important ecosystems like wetlands and barrier beaches.<sup>12</sup> The decision may not place these resources in greater danger from property rights zealots and the courts than the resources were before *Lucas*.<sup>13</sup> By allowing the government to rely on background principles of common law to justify regulatory action, the Supreme Court has conceptually expanded the "harmful" or "noxious uses" principle of takings jurisprudence,<sup>14</sup> giving the principle new vitality. Those who view *Lucas* as a cataclysmic decision for environmental regulation<sup>15</sup> may be in danger of reading too much into the creation of a new categorical rule based on economic value and too little into the exceptions to that rule.<sup>16</sup>

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12. Notwithstanding this argument that *Lucas* should not severely restrain federal and state regulators from pursuing policies that protect important natural resources like wetlands, the resolution of questions left open after *Lucas* by the Court of Federal Claims may well chill such initiatives. The rhetoric of the majority's language, the palpable distrust of state legislators and regulators, and the obvious effort in the majority's decision to let *Lucas* win all send strong pro-property rights signals to the lower courts. The ultimate application of the *Lucas* doctrine by the lower courts may be more significant for the protection of natural resources.

The Supreme Court has shown some initial reluctance to review post-*Lucas* takings claims on the merits. See Sugameli, *Sound and Fury*, *supra* note 7, at 499-502 (discussing this and other post-*Lucas* cases of interest). But see *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (holding conditioned approval of permit to expand business in floodplain, which required landowner to dedicate public greenway and pedestrian/bicycle pathway, unconstitutional as uncompensated taking). In *Dolan*, the Supreme Court refined the *Nollan* nexus test to require individualized determinations of "rough proportionality" between the regulatory exaction and proposed development's impact.

13. For an interesting discussion of the ascension of the takings issue on the political conservative agenda and how the majority's decision was intended to promote that agenda, see Richard Lazarus, *Putting the Correct 'Spin' on Lucas*, 45 STAN. L. REV. 1411 (1993) [hereinafter Lazarus, *Spin*]. See also Kenneth Berlin, *Just Compensation Clause and the Workings of Government: The Threat from the Supreme Court and Possible Responses*, 17 HARV. ENVTL. L. REV. 97 (1993) (describing efforts by activist conservative legal scholars to use property rights as cornerstone of their attack on activist government) [hereinafter Berlin, *Just Compensation*]; Sugameli, *Sound and Fury*, *supra* note 7, at 442 (stating that pro-takings advocates are using takings as back-door administrative, legislative, and judicial attacks on laws and regulations that cannot be repealed or modified on their merits).

14. For a contrary view, see Humbach, *Nuisance*, *supra* note 9 (arguing that, after *Lucas*, remedial statutes meant to improve common law could still be subject to preemption by common law is extraordinary reversal of centuries-old roles).

15. In the words of Justice Blackmun, "Today the Court launches a missile to kill a mouse." *Lucas*, 112 S. Ct. at 2904 (Blackmun, J., dissenting). Blackmun protested the decision as well as "each step taken to reach it." *Id.*

16. For a contrary view on the significance of the Court's linking of takings jurisprudence to the common law of nuisance, see Humbach, *Nuisance*, *supra* note 9, at 23-28. Professor Humbach argues, among other things, that *Lucas*' shift of the locus for

The remainder of this Article lays out the support for this thesis. Part II summarizes the regulatory takings doctrine and the nuisance principle and outlines both the facts of the *Lucas* case and the Supreme Court's decision. Part III examines the common law doctrines of custom and public trust and how, as "background principles" of the law of property, they fit within the exception to the bright line takings rule created by the *Lucas* Court. The analysis reveals the vitality and elasticity of these doctrines in state law, and how, rather than acting as a limit on state regulatory authority, they may enable proscriptive regulatory initiatives, such as those protecting wetlands and coastal barrier beaches. Part III concludes with a discussion of the applicability of these two common law doctrines to barrier beaches and wetlands, drawing theoretical support from the work of Carol Rose on "inherently public property."<sup>17</sup>

Part IV shows how public trust and custom can defeat a takings claim and explains that this should not destabilize expectations about property rights. This Article argues that these doctrines not only accord with public expectations about the use of barrier beaches and wetlands, but also help these lands to fulfill certain important societal and ecological functions thwarted by current understandings of regulatory takings doctrine. Nonetheless, a theoretical understanding of the public's superior interest in land protected by the doctrines of public trust and custom may founder on the reality of the landowner's justifiable frustration when her expectations about the use of her land are not in accord with public expectations based on obscure doctrinal principles. In fact, by infusing common law doctrines capable of evolution into the regulatory takings formula, the *Lucas* court has increased the opportunities for government to frustrate the expectations of private landowners. Thus, the Article concludes by cautioning that over-use or misapplication of the common law doctrines of custom and public trust could jeopardize both these doctrines and the environmental laws they help support.

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determining society's tolerance for a given proposed use of land from the legislature to the courts is inherently undemocratic and, therefore, wrong.

17. Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) [hereinafter Rose, *Comedy of the Commons*].

## II. REGULATORY TAKINGS DOCTRINE THROUGH *LUCAS*

The American commitment to property has been "an extremely durable . . . ideology,"<sup>18</sup> stemming in large part from John Locke's seventeenth-century discourse on the origin and nature of civil governments.<sup>19</sup> Property has been assigned many roles in American society.<sup>20</sup> A chief exponent of the sanctity of private property rights, Richard Epstein, has argued that property rights are a fundamental civil right because of their universality and utility.<sup>21</sup> This cry has been taken up by property rights activists, who now seek to use the takings doctrine to strike down government regulations designed to protect critical natural areas, such as wetlands, coastal barrier beaches, and habitats for endangered species.<sup>22</sup>

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18. Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSP. IN AM. HIST. 331-32 (1971), quoted in MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY 1789-1920* 20 (1987).

19. John Locke, *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Charles L. Sherman ed., 1937) was written between 1685 and 1688. According to Selvin and other scholars, Locke's treatise served as the "reference point for nineteenth century judicial discourse on the sanctity of private property and on the extent of permissible governmental interference with the enjoyment of that property," SELVIN, *supra* note 18, at 20. Another oft-cited reference point is Blackstone's *COMMENTARIES*. For example:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe  
 . . . .

2 WILLIAM BLACKSTONE, *COMMENTARIES* \*2, quoted in Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993).

20. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (advocating creation of property rights to protect intangibles like government entitlements); see also J. Peter Byrne, *Green Property*, 7 CONST. COMMENTARY 239 (1990) (propounding green theory of property to give legal effect to ecological land ethic and to support regulatory program of land use serving ecological ends of removing impediments to exercise of public control).

21. Epstein, *Property*, *supra* note 3, at 207 ("Given where we are today, we need less government and wider spheres of individual autonomy"). But see Carol Rose's response to those who question whether the property rights approach enhances the cause of individual autonomy, equality and liberty. Rose, *Property Rights*, *supra* note 4, at 593 (claiming property rights approach based on private rights system could result in restrictions on land use which could jeopardize some elements of autonomy, equality, and liberty).

22. See Berlin, *Just Compensation*, *supra* note 13, at 99 (discussing how conservative ideologues have invoked the Just Compensation Clause as cornerstone of their attack on activist government); see also Sugameli, *Sound and Fury*, *supra* note 7, at 442.

### A. A Snapshot of the High- (Low-) Lights of Takings Law

Until the last quarter of the nineteenth century, takings claims consisted largely of allegations that the government had taken physical possession of private property through the exercise of its eminent domain power.<sup>23</sup> The general rule was that no compensation need be paid unless the government formally appropriated the property, or, at the very least, seized possession of it.<sup>24</sup> Between 1871 and 1922, the application of the takings doctrine radically changed. During that period, the Supreme Court handed down three decisions that became the foundation of the modern takings doctrine and moved the emphasis away from the requirement of physical possession of property by the government.

The first case to move the takings doctrine beyond its early confines was *Pumpelly v. Green Bay Co.*<sup>25</sup> In *Pumpelly*, the Supreme Court held that a landowner was entitled to compensation when his property was physically invaded by water, earth, and sand as a result of the construction of a state-authorized dam by an upstream property owner. Although the Court used language which presaged more modern cases involving diminution of economic value,<sup>26</sup> the case has been viewed as establishing the physical occupation rule in takings law. This rule states that where there has been permanent physical occupation of land, the government must compensate the landowner, even if the land has not been nominally taken or appropriated.<sup>27</sup> Courts considered physical invasion as a

23. According to some scholars, "[t]he most historically settled application of the Just Compensation Clause—indeed perhaps the *only* historically settled application—is the requirement that government must pay for property it seizes through an exercise of eminent domain." Rubinfeld, *Usings*, *supra* note 4, at 1081. See SELVIN, *supra* note 18, at 49–52 (discussing the exercise of eminent domain power in the 19th century).

24. See Rubinfeld, *Usings*, *supra* note 4, at 1083. See also *Lucas*, 112 S. Ct. at 2892 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871)); *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879); *Gibson v. United States*, 166 U.S. 269, 275–76 (1897) for the same proposition.

25. 80 U.S. (13 Wall.) 166 (1871). "It would be a very curious and unsatisfactory result . . . if the government refrains from the absolute conversion of real property . . . [I]t can destroy its value entirely . . . without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use." *Id.* at 177–78. For other early examples of the regulatory takings doctrine, see Washburn, *supra* note 7, at 165–66 n.22.

26. "[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, *so as to effectually destroy or impair its usefulness*, it is a taking, within the meaning of the Constitution . . ." *Pumpelly*, 80 U.S. (13 Wall.) at 181 (emphasis added).

27. For a discussion of the difference between physical *occupation* cases, such as



*per se* compensable taking.<sup>28</sup> Under this rule, the amount of land physically displaced by the government's actions need not be large.<sup>29</sup>

The second foundational case in this period was *Mugler v. Kansas*,<sup>30</sup> in which the Supreme Court held that the owner of a brewery was not entitled to compensation for a state law prohibiting him from manufacturing or selling alcohol. The plaintiff relied on *Pumpelly* to argue that the statute destroyed his beneficial use of the brewery property.<sup>31</sup> The Court brushed aside this argument, not on the traditional ground that Mugler had suffered no invasion of his land,<sup>32</sup> but because the sole basis of the prohibition law was to protect individuals from harm.<sup>33</sup> Private property, the Court stated, is "held under the implied obligation that the owner's use of it shall not be injurious to the community."<sup>34</sup>

*Mugler* introduced the "harmful" or "noxious use" principle, also referred to as the "nuisance exception" to the Just Compensation Clause.<sup>35</sup> This principle sustains government actions designed

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Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding state law requiring building owners to allow cable companies to place cable facilities in their buildings *per se* taking of private property) and United States v. Causby, 328 U.S. 256 (1946) (holding physical interference with air space surrounding property equivalent to occupying landowner's property), and physical *invasion* cases like Kaiser Aetna v. United States, 444 U.S. 164 (1979) (finding that imposition of navigational servitude on landowner's property for public access was compensable taking), see Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5, 14-21 (1990) [hereinafter Rieser, *Public Trust*]. In the latter category of cases, according to Rieser, the courts balance public against private interests, as opposed to finding a *per se* taking. See *id.* at 14-15.

28. See *Lucas*, 112 S. Ct. at 2893. *Per se* categorical treatment entitles a landowner to automatic compensation once he or she has shown that the case fits into the category. It also relieves the court from examining on a case by case basis the legitimacy of the public interest being advanced in support of the restriction. *Id.*

29. In *Loretto*, the Supreme Court found displacement of a cubic foot of space on the roof of the complainant's building sufficient to hold that a New York statute requiring landlords to permit cable companies to install their equipment in rental apartments effected an uncompensated taking. The Court stated that "whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." 458 U.S. at 438 n.16.

30. 123 U.S. 623 (1887).

31. *Id.* at 667.

32. In *Mugler*, the plaintiffs argued that regulatory initiatives that destroy the value of property require compensation. However, the Supreme Court distinguished *Mugler* from *Pumpelly* by describing *Pumpelly* as involving a "permanent . . . physical invasion" and a "practical ouster of . . . possession." *Id.* at 668 (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878)).

33. *Mugler*, 123 U.S. at 668.

34. *Id.* at 665.

35. While *Lucas* diminishes the significance of the *Mugler* line of cases by labelling the nuisance principle "simply the progenitor" of more contemporary statements about requiring land-use regulations to advance a legitimate state interest in order to justify a

to protect the public from harm regardless of the extent of interference with the landowner's use of his property. After *Mugler* and until *Lucas*, the nuisance principle had been applied repeatedly to sustain a wide variety of regulations, including some that physically invaded a landowner's property<sup>36</sup> and others that severely restricted the property's use.<sup>37</sup> The Supreme Court has also applied the principle to activities that might in and of themselves not be considered noxious, but fail the public nuisance test because of the particular location in which they occur.<sup>38</sup> The analysis by the reviewing court in these cases was no more searching than was necessary to find a harm-preventing justification for the restriction.<sup>39</sup>

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taking, it does not completely reject those cases. *Lucas*, 112 S. Ct. at 2897. The Court's failure to reconcile the historic conflict between *Mugler* and the economic diminution test has drawn from one takings scholar the criticism that it was "spinning" the *Lucas* opinion "with the hope that lower courts will mistake the promise for the delivery and adopt its broad language rather than its narrow holding." Lazarus, *Spin*, *supra* note 13, at 1413.

36. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (holding that destruction of cedar trees that posed threat to nearby orchard is not compensable taking).

37. See, e.g., *Stuyvesant v. Mayor of New York*, 7 Cow. 588 (N.Y. Sup. Ct. 1827) (holding ordinance barring burials in certain parts of city constitutional); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (upholding legislation prohibiting manufacture of oleomargarine despite allegation of complete economic deprivation); *Reiman v. City of Little Rock*, 237 U.S. 171 (1915) (holding that ordinance forbidding operation of livery stable in downtown area does not effect compensable taking); *Hadachek v. Sebastian*, 239 U.S. 394 (1915) (sustaining ordinance forbidding operation of brickyard in residential area); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding regulation closing an operating gravel pit); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (sustaining disclosure of confidential data even when company is deprived of all property interests in its trade secrets). See also the denial of *certiorari* in *First English Evangelical Lutheran Church v. Los Angeles*, 493 U.S. 1056 (1990) (upholding lower court ruling, 258 Cal. Rptr. 893 (Cal.App. 1989), that applied the nuisance principle to sustain floodplain ordinance causing landowner total economic loss). The majority opinion in *Lucas*, therefore, errs when it says that it could find no case that employed the harmful use prevention logic to sustain a regulation that wholly eliminated the value of a claimant's land. *Lucas*, 112 S. Ct. at 2899. What is even more puzzling about the Court's treatment of precedent on this point is its use of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981) to support the proposition that when all economically beneficial or productive use of land has been denied, the landowner is treated categorically as having suffered a taking, since none of these cases involves total economic or productive loss of property. *Lucas*, 112 S. Ct. at 2893-94.

38. "Merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." This concept was used to sustain zoning regulations in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

39. In *Lucas*, the Supreme Court found the failure by the lower court to conduct a more searching review and its tautological reliance on the nuisance principle to be reversible error. The *Lucas* majority rejects "noxious use logic" as a "touchstone to

The third, and by far the most controversial, of the three cornerstone cases of the modern takings doctrine was *Pennsylvania Coal Co. v. Mahon*.<sup>40</sup> In *Pennsylvania Coal*, the Supreme Court for the first time struck down a regulation as an uncompensated taking on the sole ground that state law<sup>41</sup> had gone "too far" in diminishing the economic value of the landowner's property.

[S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.<sup>42</sup>

The decision contributed a third takings test for courts to apply: the extent to which the government's action diminished the economic value of the landowner's property.<sup>43</sup>

Generally referred to as the touchstone of the regulatory takings doctrine,<sup>44</sup> *Pennsylvania Coal* is perhaps best known for its opacity on the precise contours of that doctrine. Holmes' failure to define how far was "too far"<sup>45</sup> in his economic diminution test

distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation." *Lucas*, 112 S. Ct. at 2899.

40. 260 U.S. 393 (1922). For a spirited critique of Justice Holmes' decision, see J. Peter Byrne, *Ten Arguments For the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* \_\_\_\_ (1994) (at 12–22 in unpublished draft manuscript on file with the *Harvard Environmental Law Review*). For additional critical commentary, see Rubinfeld, *Usings*, *supra* note 4, at 1086–87.

41. The state statute, the Kohler Act, prohibited the mining of coal beneath the property of another in such a way as to cause subsidence damage. See *Pennsylvania Coal*, 260 U.S. at 412–13. These rights are called support rights, which grant neighboring owners reciprocal easements of support.

42. *Pennsylvania Coal*, 260 U.S. at 413.

43. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (finding that New York City's historical preservation ordinance, which prevented landowner from constructing skyscraper on property, does not effect taking because landowner could transfer rights to adjacent properties) offered a variation on the diminution test by looking not at the extent of loss suffered by the landowner, but at the value of the remaining use of the land.

44. One scholar has referred to *Pennsylvania Coal* as the "Everest" of takings law. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 156 (1977), quoted in Rubinfeld, *Usings*, *supra* note 4, at 1086.

45. One of the issues in *Pennsylvania Coal* that remains unresolved today is the so-called denominator question: what part of the landowner's property should be used as the denominator in the takings equation? The Kohler Act left the mining companies with

initiated years of judicial struggling<sup>46</sup> to produce a workable formula to answer that question.

*Pennsylvania Coal* also left unreconciled the conflict between the nuisance principle and the new economic diminution or residuum test. For instance, Brandeis' dissent in *Pennsylvania Coal* raised *Mugler* and its progeny in defense of the state law,<sup>47</sup> but Holmes did not even mention *Mugler* in the majority opinion.

Fifty-five years later, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,<sup>48</sup> the Court sustained another Pennsylvania statute aimed at preventing surface subsidence from coal mining, because "Pennsylvania acted to arrest what it perceives to be a significant threat to the common welfare."<sup>49</sup> The *Keystone* Court, however, neither affirmed the *Mugler* line of cases nor specifically overruled *Pennsylvania Coal*, continuing the confusion begun by Justice Holmes in the latter case.<sup>50</sup> The stage was set for David Lucas to try

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no economic value in the below-ground estate. Justice Brandeis, in dissent, argued that the whole estate, not just the below-ground estate, should be examined to determine the extent of the economic loss suffered by the landowner. See *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting). The debate over the denominator in the takings equation continues in the *Lucas* decision, which concedes that "the rhetorical force of [the Court's] 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." 112 S. Ct. at 2894 n.7. Footnote 7 to *Lucas* describes *Penn Central* as an "extreme" and "unsupportable view of the relevant calculus," and indicates a willingness to revisit the question, casting a cloud over that precedent. *Lucas*, 112 S. Ct. at 2894 n.7. The majority hints that the resolution of the denominator question may also lie in a state's common law of property and to what degree the state's common law has recognized and protected the particular legal interest which the taking claimant alleges has decreased in value.

See also *Tull v. Virginia*, 61 U.S.L.W. 3215, 3226 (U.S. October 6, 1992) (describing the unpublished Nov. 4, 1991 ruling of the Accomack County Circuit Court as follows: "Denial of permit to fill approximately two acres of wetlands that are part of 43-acre site that was to be subdivided for use as mobile home sites did not deprive owners of all economically viable use of their property, and thus there has been no taking of property by inverse condemnation."), cert. denied, 113 S. Ct. 191 (1992). See also Sugameli, *Sound and Fury*, *supra* note 7, at 462-84 (discussing post-*Lucas* cases on this and other points of interest). Resolution of the denominator question is of great importance in wetlands permit denial cases, since these cases frequently involve only a fraction of the landowner's total property ownership.

46. It has been suggested that this struggle might be "inevitable," given the difficulty of "defining the line between valid majoritarian regulatory demands and invalid confiscation of individual property rights." ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 457 (1992).

47. *Pennsylvania Coal*, 260 U.S. at 418 (Brandeis, J., dissenting).

48. 480 U.S. 470 (1987).

49. *Id.* at 485; see also Rubinfeld, *Usings*, *supra* note 4, at 1090 n.91 (noting that Justice Stevens labelled bulk of Holmes' decision in *Pennsylvania Coal* "advisory," in order to distinguish that case from *Keystone* with respect to *Mugler* nuisance principle).

50. The Supreme Court in *Keystone* acknowledged that state law had not caused a

to bring these two takings tests together in a way that favored his interests.

### B. Lucas v. South Carolina Coastal Council<sup>51</sup>

In 1986, David Lucas, a real estate developer, bought two undeveloped lots on Isle de Palm, South Carolina.<sup>52</sup> He intended to build a home for his family on one lot and to use the second for construction of another single-family residence for resale.<sup>53</sup> Mr. Lucas' plans were interrupted in 1988 by the South Carolina legislature's passage of the Beachfront Management Act.<sup>54</sup> This Act effectively stopped Lucas from proceeding with his plans by prohibiting development seaward of a setback line.<sup>55</sup>

Lucas elected not to contest the setback line,<sup>56</sup> but immediately challenged the Beachfront Management Act in state court.<sup>57</sup> He

total loss of economic viability, since the owner retained significant economic value in the non-support parts of the estate unaffected by the law, and so relied on *Mugler* to sustain the law. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489-90 (1987). While doing so, however, the Supreme Court left standing the conflict between two different views of the takings doctrine (economic viability and harm-preventing).

51. The background facts are drawn from the majority's opinion in *Lucas*, from Justice Blackmun's dissent, and from the *amicus curiae* Brief in Support of Respondent, filed by Nueces County, Texas *et al.*, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (No. 91-453) (copy on file with the *Harvard Environmental Law Review*). The author participated in the drafting of that brief. See generally Lazarus, *Spin*, *supra* note 13.

52. Isle de Palm, which has been under development since the late 1970s, is a barrier island situated eastward of Charleston, South Carolina. During Hurricane Hugo, which hit South Carolina particularly hard in 1989, the entire Isle de Palm was flooded. Generally, everything on the island within 500 feet of the water, including Lucas' property, was either severely damaged or completely destroyed. Herbert S. Saffir, *Hurricane Hugo and the Implications for Design Professionals and Code-Writing Authorities*, 8 J. COASTAL RES. 25, 27 (Special Issue, 1991).

53. Lucas had been involved in the development of Isle de Palm since the late 1970s. He paid \$975,000 for the two lots. A house had been constructed on the lot between his two lots, and there were several houses on other nearby beachfront lots. *Lucas*, 112 S. Ct. at 2887, 2889.

54. S.C. CODE ANN. § 48-39-290 (Law. Co-op. 1993).

55. Prior to passage of the 1988 Beachfront Management Act, Lucas' property had been zoned for single-family residential construction. *Lucas*, 112 S. Ct. at 2889.

56. Under the Act, the South Carolina Coastal Council was directed to establish a baseline connecting the landward-most points of erosion on the Isle de Palm during the last forty years. S.C. CODE ANN. § 48-39-290 (Law. Co-op. 1993). The baseline the Council drew for Lucas effectively blocked him from developing his land other than to construct nonhabitable improvements like "wooden walkways" and "small wooden docks." *Lucas*, 112 S. Ct. at 2889-90 n.2.

57. In 1990, the State amended the law to authorize the Coastal Council to issue special permits for construction of habitable dwellings seaward of the baseline. S.C. CODE

alleged the Act destroyed all economically viable use of his property, and thus worked a compensable taking under the Fifth and Fourteenth Amendments.<sup>58</sup> Lucas' position that he was entitled to compensation regardless of the Act's alleged "police power" purpose directly challenged the nuisance exception to the Just Compensation Clause.<sup>59</sup>

The state trial court agreed with Lucas and awarded him over \$1.2 million.<sup>60</sup> The State Supreme Court reversed,<sup>61</sup> finding that the nuisance principle applied to the Beachfront Management Act.<sup>62</sup> The State court relied on *Mugler v. Kansas*<sup>63</sup> and its progeny for support.<sup>64</sup> The State court did not examine the legislative findings in the Beachfront Management Act, because Lucas conceded their validity.<sup>65</sup>

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ANN. § 48-39-290(D)(1) (Law. Co-op. 1993). Lucas elected not to apply for a special permit, but to continue to prosecute his court action. *Lucas*, 112 S. Ct. at 2902 (Kennedy, J., dissenting). The South Carolina Supreme Court declined to dismiss the appeal as unripe, because Lucas had not had an opportunity to apply for such a permit, nor had the Coastal Council an opportunity to respond to that application. *South Carolina Coastal Council v. Lucas*, 404 S.E.2d 895, 902 n.8 (S.C. 1991); *Lucas*, 112 S. Ct. at 2891.

58. *Lucas* 112 S. Ct. at 2889-90.

59. *Id.*

60. *Lucas*, 112 S. Ct. at 2890.

61. Two dissenting State Supreme Court Justices agreed that *Mugler* precluded the finding of a compensable taking if the state law is necessary to protect the public health, safety, and welfare, but believed the 1988 Act did not have as its primary purpose the prevention of a nuisance or comparable harms. Instead, the dissenters postulated that the Act conferred a benefit on the state by creating wildlife habitat and places of natural beauty as well as promoting tourism. *South Carolina Coastal Council v. Lucas*, 404 S.E.2d 895, 906 (S.C. 1991). The dissenters would have found a taking based on the trial court's finding that the lots lacked fair market value and economically viable use, and then would have remanded the matter back to the Coastal Council to allow Lucas to apply for special permits under the 1990 Amendments. Only if the Council then denied those permits would the dissenters have awarded Lucas compensation. *South Carolina Coastal Council*, 404 S.E.2d at 907-08.

62. In a companion case, the U.S. Court of Appeals for the Fourth Circuit agreed with the South Carolina Supreme Court that the Beachfront Management Act's prohibition against the rebuilding of structures between the setback line and the baseline neither effected a taking nor worked a due process violation. *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169-70 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992) (finding that substantial reduction of property's attractiveness to potential purchasers does not establish right to compensation) (citing *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984)). *See also* *Beard v. South Carolina Coastal Council*, 403 S.E.2d 620 (S.C. 1991), *cert. denied*, 112 S. Ct. 185 (1991) (holding denial of permit to build bulkhead not taking).

63. 123 U.S. 623 (1887) (holding that prohibiting the sale and manufacture of intoxicating liquors did not constitute a taking).

64. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). *See, e.g., supra* notes 36-37.

65. Lucas did not contest the findings of the State law that construction in the coastal zone threatened an important public resource and created a public nuisance. *Id.* at 898.

The U.S. Supreme Court granted *certiorari*.<sup>66</sup> The case generated intense interest<sup>67</sup> because it offered the first opportunity since the Court's rulings in 1987<sup>68</sup> for a new pronouncement on takings law.<sup>69</sup>

A majority of the Supreme Court reversed the South Carolina Supreme Court decision sustaining application of the Beachfront Management Act<sup>70</sup> to Lucas' property.<sup>71</sup> Relying heavily on *dicta* from *Agins v. Tiburon*,<sup>72</sup> the Supreme Court held in *Lucas* that

66. 112 S. Ct. 436 (1991).

67. Twenty-seven *amicus curiae* briefs were filed: 16 supporting the petitioner and 11 supporting the respondent. For a list of those interests that filed *amicus* briefs, see Sugameli, *Sound and Fury*, *supra* note 7, at 453. There was considerable dissension within the federal government over whether the United States should support the Coastal Council's regulation, which implemented the Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-1464 (1972). Although the Solicitor General ultimately filed a brief supporting reversal, he rejected a strong pro-takings brief drafted by the Acting Assistant Attorney General in response to objections to that draft raised by National Oceanic and Atmospheric Administration ("NOAA"), Army Corps of Engineers, Federal Emergency Management Agency ("FEMA"), and Environmental Protection Agency ("EPA"). See responses to Peter R. Steenland, Jr., Chief of the Appellate Section of the Environment and Natural Resources Division, Department of Justice, from Thomas A. Campbell, General Counsel, NOAA (Dec. 5, 1991), William J. Haynes II, General Counsel, Department of the Army (Dec. 20, 1991), Patricia M. Gromley, General Counsel, FEMA (Dec. 20, 1991); and an internal memorandum from Raymond B. Ludwiszewski, Acting General Counsel, EPA, to the EPA Administrator (Dec. 20, 1991) (referenced documents on file with the *Harvard Environmental Law Review*).

68. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that approval of building permit need not depend on owner granting public access); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (holding temporary deprivations of use to be compensable under Takings Clause); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (sustaining state law prohibiting mining that caused subsidence).

69. For a list of other takings cases handled by the Court in its 1991-92 Term, see *supra* note 5.

70. Conservationists have taken some comfort from the fact that the *Lucas* decision did not declare the Beachfront Management Act unconstitutional; the Court merely held invalid its application to Lucas' property.

71. Until *Lucas*, courts had generally sustained beach setback laws. See, e.g., *Gorieb v. Fox*, 274 U.S. 603 (1927) (holding that ordinance requiring new houses to be set back reasonable distance from streets does not violate due process); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992) (sustaining Beachfront Management Act's prohibition against rebuilding previously destroyed dwellings between setback and base lines); *McNulty v. Town of Indianantic*, 727 F. Supp. 604 (M.D. Fla. 1989) (sustaining oceanfront setback ordinance); *Hall v. Board of Env'tl. Protection*, 528 A.2d 453 (Me. 1987) (sustaining law prohibiting development in certain sensitive shoreline areas). For a thorough analysis of these and other state setback laws as well as the fate of beach access laws when faced with takings challenges, see Amelia T.R. Starr, 'Ruin Hath Taught Me Thus to Ruminant': *Rejecting the Regulatory/Eminent Domain Dichotomy for Coastal Land*, 1992/1993 ANN. SURV. AM. L. 117, 138-47 [hereinafter Starr, *Coastal Land*].

72. The principle that land-use regulation that fails to substantially advance legitimate state interests or denies an owner economically viable use of his land effects a taking was introduced as *dicta* in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); the *Lucas*

persons suffering total economic deprivation<sup>73</sup> as a result of government regulation are categorically<sup>74</sup> entitled to compensation unless background common law principles of nuisance or property justify the restriction.<sup>75</sup> The Court remanded the case for a finding

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majority's elevation of this to the level of a categorical rule immediately generated controversy. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992). "The Court's suggestion that *Agins* . . . created a new *per se* rule . . . is unpersuasive." *Id.* at 2911 n.11 (Blackmun, J., dissenting). "[O]ur rulings have rejected such an absolute position." *Id.* at 2918 (Stevens, J., dissenting). *Agins* is generally considered to stand for the obverse principle, that the ultimate conclusion in a takings case "necessarily requires a weighing of private and public interests." 447 U.S. at 261.

73. In reaching its decision, the *Lucas* majority deferred to the trial court's finding that the Act deprived Lucas of all economically viable use of his land. Professor Lazarus cites this omission as one of several obstacles (the others being ripeness and standing) the majority leapt over in its eagerness to confer a win on Lucas. See Lazarus, *Spin*, *supra* note 13, at 1418–21. This assumption of total economic ruin generated acerbic comment from several of the other Justices, and formed the basis of Justice Souter's statement, in which he voted to dismiss the writ for being improvidently granted. See 112 S. Ct. at 2925 (Souter, J., separate statement); see also *id.* at 2896 n.9 (Kennedy, J., concurring); *id.* at 2904 (Blackmun, J., dissenting); *id.* at 2918 (Stevens, J., dissenting).

74. By treating total economic diminution cases categorically, the majority apparently rejected the case-by-case approach which had dominated previous takings jurisprudence cases. See *Lucas*, 112 S. Ct. at 2910 (Blackmun, J., dissenting) ("If one fact about the Court's taking jurisprudence can be stated without contradiction, it is that 'the particular circumstances of each case' determines [sic] whether a specific restriction will be rendered invalid by the government's failure to pay compensation.") (citations omitted). See also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("[T]his court . . . has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."); *United States v. Caltex*, 344 U.S. 149, 155 (1952) (taking into account the context of the government's action when deciding takings case); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[T]his is a question of degree—and therefore cannot be disposed of by general propositions."); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (looking at the circumstances of the individual case in evaluating effect of city ordinance); *Agins*, 447 U.S. at 260–61 ("[N]o precise rule determines when property has been taken . . . . [T]he question necessarily requires a weighing of private and public interests."); *Mugler v. Kansas*, 123 U.S. 623, 657 (1887) (holding that state statute which retroactively closed down brewery, thereby depriving owner of use of his property, was not unconstitutional).

On its face, the application of a categorical rule to a takings claim eliminates any consideration of the validity of the purpose of the government's restrictive activities. Cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (holding that takings case "entails inquiry into . . . the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations"). This use of a *per se* rule to dispose summarily of a second category of takings claims parallels the Court's tendencies in other areas of constitutional law, such as the two-tiered strict scrutiny or rational basis standard of review it has used in First Amendment, Commerce Clause, Due Process, and Equal Protection cases. Under that approach, laws subject to strict scrutiny rarely survive the review, while those subject to the (less searching) rational basis test are sustained. Perversely, because the circumstances requiring strict scrutiny do not occur frequently, just as total takings are rare, the approach results in a reverse presumption, with most laws being sustained. This same phenomenon may occur after *Lucas* as well. See Lazarus, *Spin*, *supra* note 13, at 1427–28, for further exposition of this thought.

75. The U.S. Supreme Court briefly discussed the issue of whether *Lucas*' claim



on whether South Carolina's common law of nuisance or property would bar construction of Lucas' dwellings.<sup>76</sup>

The Supreme Court was divided over the use of nuisance as the touchstone for determination of a taking. Justice Scalia wrote for the majority, which included Chief Justice Rehnquist and Justices White, O'Connor, and Thomas. Justices Blackmun and Stevens dissented, and while Justice Kennedy concurred, all three Justices found the majority's use of the common law of nuisance "too narrow a confine for the exercise of regulatory power in a complex and interdependent society."<sup>77</sup> Furthermore, Justices Blackmun<sup>78</sup> and Stevens<sup>79</sup> considered the case unripe for the Court to decide. Justice Souter, filing a separate statement, was disturbed that the district

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was unripe because of the 1990 Amendment to the Beachfront Management Act allowing him to apply for a special permit, which he had not done. *See Lucas*, 112 S. Ct. at 2890-91. The Court noted that the South Carolina Supreme Court's decision, by reaching the merits and not resting its judgment on ripeness grounds, precluded both "practically and legally" any temporary takings claim by Lucas for the economic losses he suffered prior to the statutory amendment. *Id.* at 2888. On remand, the South Carolina Supreme Court identified as a separate issue the question of whether the remand created a cause of action for Lucas for the temporary taking of his property. *See Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992).

76. The majority noted that "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land [because they] rarely support prohibition of the 'essential use' of land." *Lucas*, 112 S. Ct. at 2901 (citations omitted). *But see Lazarus, Spin, supra* note 13, at 1424 (misconception of essential uses).

77. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring). While Justice Kennedy acknowledged that the common law of nuisance may accord with most expectations of property owners who face regulation, he felt that coastal property may present "such unique concerns for a fragile land system" that the state could exceed the bounds of the common law of nuisance. *Id.*

78. Justice Blackmun argued that: (1) the 1990 Amendment to the Beachfront Management Act authorizing special permits meant Lucas had not suffered a taking; (2) any temporary taking claim Lucas might have had was barred by his failure to exhaust his administrative remedies; and (3) there was no evidence in the record to support the trial court's finding that Lucas' property had lost all value. *Id.* at 2907-08 (Blackmun, J., dissenting). Blackmun also objected to the breadth of the Court's decision in a very narrow case. *Id.* at 2904. He criticized the majority opinion for altering "long-settled rules of review" by not deferring to the South Carolina Supreme Court's decision to accept the unchallenged judgment of its state legislature. *Id.* at 2909. Blackmun also opposed the majority's decision to place on states the burden of convincing courts that legislative judgments are correct. *Id.* at 2909.

79. Justice Stevens commented on the absence in the record of any evidence of injury-in-fact, which would entitle Lucas to even a temporary takings claim. In particular, Stevens noted that Lucas had acquired his property eighteen months before the state Beach Management Act was passed, and there was no evidence he had ever applied for a permit. *Id.* at 2917-18 (Stevens, J., dissenting). Justice Stevens bemoaned the majority's failure to avoid the "premature adjudication" of an important constitutional question. *Id.* at 2917. He objected to the "illogical" expansion of the concept of regulatory takings. *Id.* He also argued, as did Justice Blackmun, that takings jurisprudence does not support the majority's

court's finding that Lucas had been deprived of all economic interest in his land had not been reviewed by the South Carolina Supreme Court, and was possibly in error.<sup>80</sup> None of the four Justices addressed the appropriateness of the majority's reference to "background principles of the State's law of property."<sup>81</sup>

The Supreme Court remanded the case to the State Supreme Court for a ruling on whether, as a matter of state law, common law principles of nuisance or property would have prevented the construction of David Lucas' houses.<sup>82</sup> The South Carolina Supreme Court ruled that such principles would not bar the construction,<sup>83</sup> found that the Beachfront Management Act resulted in a temporary taking of Lucas' property, and further remanded the case for a trial on the issue of the "actual damages" suffered by Lucas for the "temporary nonacquisitory taking [of his property]."<sup>84</sup> The issue of damages never reached a jury trial, as the State settled with Lucas for \$1.5 million.<sup>85</sup>

The next part of this Article addresses those common law principles that the South Carolina State Supreme Court considered in concluding that Lucas was entitled to compensation.

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new categorical rule, and dismissed *Agins* as *dicta* which had not been followed in the Court's rulings before *Lucas*. *Id.* at 2917-19 (Stevens, J., dissenting). *See also id.* at 2911 n.11 (Blackmun, J., dissenting).

80. *Id.* at 2925 (Souter, J., statement).

81. *Id.* at 2900.

82. *Lucas*, 112 S. Ct. at 2901-02.

83. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992). According to one of the Coastal Council lawyers, there was never an opportunity for a full briefing either on the applicability of the nuisance exception to Lucas' situation, or on the validity of the trial court's factual finding of complete loss of economic value, because of the accelerated pace at which the State court conducted the remand. *See Lazarus, Spin, supra* note 13, at 1413 n.14.

84. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992). The South Carolina State Supreme Court held that Lucas had suffered a temporary taking commencing with the enactment of the 1988 Act through November 20, 1992, the date of the court order. The South Carolina court also noted that Lucas could apply for a special permit, equivalent to a variance or exemption from the statutory prohibition, which could, if denied by the Coastal Council, trigger a second takings challenge by Lucas. *Id.*

85. In a bizarre twist to the story, after the settlement in which South Carolina compensated Lucas for the land, the Coastal Council announced its intent to sell the lots for development, saying "with a house to either side and in between the lots, it is reasonable and prudent to allow houses to be built." *See H. Jane Lehman, Accord Ends Fight Over Use of Land*, WASH. POST, July 17, 1993, at E1.

### III. BACKGROUND PRINCIPLES OF THE COMMON LAW OF NUISANCE AND PROPERTY

The background principles of the common law of nuisance and property have always been part of takings jurisprudence.<sup>86</sup> Yet their newfound prominence in regulatory takings jurisprudence, as a result of *Lucas*, has left scholars,<sup>87</sup> jurists,<sup>88</sup> and state officials<sup>89</sup> concerned about their effect on the ability of state regulators to protect the public interest.<sup>90</sup> The *Lucas* Court's reliance upon common law doctrines to provide an "exogenous anchor for takings law"<sup>91</sup> need not be a cause for concern—at least with respect to protection of wetlands and barrier beaches.<sup>92</sup>

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86. As Professor Humbach points out in an article highly critical of *Lucas*, the common law of nuisance has "long been relevant" to takings analysis because "background principles of the state's law of . . . nuisance shape the contours of constitutional 'title'." Humbach, *Nuisance*, *supra* note 9, at 7. The same can be said of the common law of property. See generally Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943 (1993) (advocating that government's right to constrain use of property is limited by what it withheld from owners at outset, which requires review of historical definition of property) [hereinafter Sax, *Western Water*].

87. See, e.g., Humbach, *Nuisance*, *supra* note 9.

88. Justice Stevens complains that the majority's use of common law doctrines represents a return to *Lochner v. New York*, 198 U.S. 45 (1905), and will "freeze" state common law by depriving state legislatures of their traditional power to revise that law as it affects private property rights. *Lucas*, 112 S. Ct. at 2921 (Stevens, J., dissenting). Justice Kennedy finds the common law of nuisance "too narrow a confine for the exercise of regulatory power in a complex and interdependent society." *Id.* at 2903 (Kennedy, J., concurring). Justice Blackmun "searches in vain . . . for anything resembling a principle in the common law of nuisance." *Id.* at 2914 (Blackmun, J., dissenting).

89. Twenty-six states, the Territory of Guam, and the Commonwealth of Puerto Rico filed an *amicus curiae* brief in support of the South Carolina Coastal Council. California also filed a separate brief in support of the Coastal Council specifically addressing its concern that it would not be able to protect the public interest if the Supreme Court found a taking in *Lucas*. Brief of *Amicus Curiae* State of California in Support of Respondent, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (No. 91-453).

90. The majority does not explain how its new rule will be applied to a federal statute. Given that the U.S. Supreme Court generally has construed federal statutes to oust federal common law, *Lucas* creates the interesting question of whether federal courts will be expected to apply state common law principles to federal statutes. See, e.g., *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (holding that complex and comprehensive nature of Clean Water Act and Marine Protection, Research, and Sanctuaries Act precludes tenable inference that Congress intended additional extra-statutory remedies); *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981) (holding that 1972 Clean Water Act ousted federal common law). Professor Lazarus sidesteps this question by assuming the Supreme Court's ripeness rules will require "as applied" challenges to be initiated at the state level, or that the federal courts may abstain in order to provide state courts with the first opportunity to resolve these issues of state law. See Lazarus, *Spin*, *supra* note 13, at 1430.

91. Humbach, *Nuisance*, *supra* note 9, at 10.

92. There may be other causes for concern. For example, the Court failed to define

This part of the Article examines the *Lucas* Court's use of the nuisance doctrine in its takings analysis, and shows how the astonishing modernity of the doctrine<sup>93</sup> expands the circumstances in which courts may sustain state regulations.<sup>94</sup> The Article then examines how various property law principles have historically proscribed certain uses of property, thus preventing such uses from being "part of [the] title to begin with."<sup>95</sup>

### A. The Common Law of Nuisance

The common law of nuisance provides "[the] frameworks for varying the outer contours" of an individual's right to use her property in certain ways.<sup>96</sup> Judges have historically used this framework to help them determine whether a particular use is intolerably harmful.<sup>97</sup> Unfortunately, there may be no more "impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"<sup>98</sup> Consequently, the doctrine is extremely malleable, especially at the state court level. The *Lucas* Court's infusion of this extremely subjective, fluid doctrine into the law on takings is almost counterintuitive, given the Court's apparent desire to make takings law more determinate and to limit exceptions to the Just Compensation Clause.<sup>99</sup>

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what constitutes a "reasonable remaining use" of a landowner's property, *Lucas*, 112 S. Ct. at 2894 n.7, which may affect the landowner's ability to show total loss of the beneficial use of her property. As a result, the problem of choosing an economic yardstick by which to measure the remaining use leaves the lower courts in the same analytic quagmire in which they were caught before *Lucas*. Similarly, the Court's reliance on common law principles to create a narrow band of exceptions to its bright line categorical rule (that total economic loss effects a taking) may plunge the lower courts into an *ad hoc* search for the contours of that common law doctrine. See Sax, *Western Water*, *supra* note 86.

93. The majority in *Lucas* illustrates the modern application of the nuisance doctrine by discussing a nuclear power plant sited on an earthquake fault. This example defines the reference to prohibitions that "inhere in the title itself." 112 S. Ct. at 2900-01.

94. For a contrary view of the nuisance doctrine and its application by the Court in *Lucas*, see Humbach, *Nuisance*, *supra* note 9.

95. *Lucas*, 112 S. Ct. at 2899.

96. Humbach, *Nuisance*, *supra* note 9, at 11.

97. See *id.*

98. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 616 (5th ed. 1984) (footnotes omitted), quoted in *Lucas*, 112 S. Ct. at 2914 n.19 (Blackmun, J., dissenting).

99. The Court tried to control the leeway it feared it had given lower courts in interpreting state common law principles by warning in a clarifying footnote, "[A]n

According to the *Restatement (Second) of Torts*, a landowner commits a nuisance when the use of her property interferes substantially with the reasonable use, enjoyment, or value of another landowner's property.<sup>100</sup> Whether a particular activity creates a nuisance depends upon the seriousness of the harm it could cause to adjacent property or to the public at large,<sup>101</sup> the social value<sup>102</sup> of the landowner's activities,<sup>103</sup> the location and surroundings of the activity (i.e., the context within which the activity occurred),<sup>104</sup> and the relative ease with which the harm can be avoided through measures taken by the landowner, the government, or the adjacent property owner.<sup>105</sup> Nuisance doctrine draws upon the maxim "*sic utero tuo ut alienum non laedas*"—"one should use her own property in such a manner as not to injure the interests of others."

The nuisance doctrine's malleability results from the multi-factored balancing process<sup>106</sup> judges employ to determine which harms to prohibit and which to permit. The balance of utilities shifts over time to reflect changing mores and expectations about

affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Lucas*, 112 S. Ct. at 2902 n.18 (emphasis in original). *But see* Lazarus, *Spin*, *supra* note 13, at 1430 (stating that it is unlikely either that state courts will find their own application of precedents unreasonable or that federal courts will second-guess state judicial counterparts).

100. RESTATEMENT (SECOND) OF TORTS §§ 821B, 821F, 822A, 826 (1977). The harms inflicted on that second landowner must be "significant" and "unreasonable" to constitute nuisance. *Id.*

101. *Id.* at §§ 826, 827.

102. The majority's failure to consider *Lucas*' construction of a house, in most circumstances a benign activity, to be a nuisance in its proposed location may be another indication of the Court's belief in the social value of development of real property, and its eagerness to give it heightened constitutional protection. *See* Lazarus, *Spin*, *supra* note 13, at 1421-25.

103. RESTATEMENT (SECOND) OF TORTS § 828 (1977).

104. "[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). *See also* *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1916) (upholding municipal ordinance regulating erection and maintenance of billboards in residential districts); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (sustaining reversal of Chancery Court decree enjoining enforcement of municipal ordinance forbidding livery stable within designated area); *Welch v. Swasey*, 214 U.S. 91 (1909) (sustaining building commissioner's denial of permit where proposed building's height exceeded that allowed under local ordinance).

105. RESTATEMENT (SECOND) OF TORTS §§ 827E, 828C, 830 (1977).

106. *See* Humbach, *Nuisance*, *supra* note 9, at 10.

personal conduct,<sup>107</sup> thereby forcing the doctrine to change and evolve.<sup>108</sup> Nuisance, therefore, is anything but a certain, objective, static doctrine,<sup>109</sup> since it depends upon a judge's determination at a given point in time of the acceptability of consequences arising out of otherwise nonprohibited conduct.<sup>110</sup>

Although nuisance is a common law concept, it is affected by the legislature through its role in defining public welfare.<sup>111</sup> Legislators, especially in the environmental arena, are responsible for

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107. See *id.* at 11 ("common law of *private* nuisance is not a defined catalogue of noxious, reprehensible or even merely forbidden behavior, but is instead an essentially relativistic concept.").

108. Even the majority recognized that the nuisance doctrine is in essence evolutionary. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (*although changed circumstances, or new knowledge may make what was previously permissible no longer so*)." *Lucas*, 112 S. Ct. at 2901 (citing RESTATEMENT (SECOND) OF TORTS, § 827 cmt. g (1977)) (emphasis added).

109. One of the ambiguities of the *Lucas* opinion, as Professor Sax points out, is the time at which the restriction on use "inheres in the title." Sax, *Western Water*, *supra* note 86, at 944 n.8. Given the two very modern examples used by the Court (placing fill in a lake that causes flooding of others' land and siting a nuclear power plant over an earthquake fault) to illustrate when a landowner might not be entitled to compensation in the face of a prescriptive regulatory action (*Lucas*, 112 S. Ct. at 2900-01) and its reliance on the RESTATEMENT (SECOND) OF TORTS (*Lucas*, 112 S. Ct. at 2901), the Court appears to employ a functional or expectational rather than a historical definition of nuisance. If that supposition is correct, then a court, consistent with *Lucas*, could judge a landowner's conduct according to the nuisance doctrine in effect at the time the state sought to regulate that conduct. Compare this result with Professor Sax's view that the tone and rhetoric of the *Lucas* opinion, at least with respect to the Court's use of background principles of property, "seems deliberately calculated to cut off arguments that changing times create changing needs and with them the changing (diminished) expectations that property owners must internalize." Sax, *Western Water*, *supra* note 86, at 945. But see Richard C. Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the Lucas Decision on Shoreline Protection Programs*, 70 DENV. U. L. REV. 437, 466 (1993) (Courts have institutional advantage over legislatures in determining existing nuisance and property law. Legislatures represent narrow special interests, while courts are experienced in dealing with legal concepts and more likely to be neutral decision-makers. Hence, background principles of nuisance and property law are free to change over time as they have always done in the past.). [hereinafter Ausness, *Wild Dunes*].

110. See, e.g., *Euclid v. Ambler*, 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.").

111. See Berlin, *Just Compensation*, *supra* note 13 (arguing that *Lucas* denigrates role of legislators in making findings about public welfare). But see Lazarus, *Spin*, *supra* note 13, at 1426-27 (arguing that majority's intimations that background principles must be supplied by judge-made common law and not by legislative or regulatory initiatives will not survive review in future because of Court's changing composition). See also Joseph L. Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POL'Y 139, 150 (1988) (arguing that the only way to bring about more than peripheral change in the status of property rights is for Court to order legislatures to get out of the business of legislating) [hereinafter Sax, *Property Rights*].

filling numerous gaps in the common law.<sup>112</sup> Indeed, both the legislatures and the courts have played major roles in expanding the reach of common law nuisance, particularly with respect to protection of the environment and natural resources.<sup>113</sup> Moreover, on the policy-making side, the courts have frequently led the way for legislatures, particularly in environmental decisions.<sup>114</sup>

State courts have historically expanded the class of activities covered by nuisance law in response to changing values and priorities.<sup>115</sup> The passage of environmental statutes and regulations has

112. Legislation has filled the gaps in common law in order to protect endangered species, Endangered Species Act, 16 U.S.C. §§ 1531–1543 (1988), wetlands, 33 U.S.C. § 1344 (1988), and fragile coastal areas, Coastal Zone Management Act, 16 U.S.C. § 1451 (1988).

113. While *Lucas* has clearly enhanced the role of the courts and judge-made common law in the takings equation, it has not ousted legislators from the process. The very nature of nuisance law and its development shows an interplay between the legislature and the courts. One commentator has described this interplay as a “functional dialogue.” Memorandum from Professor Zygmunt Plater, Boston College Law School, to Cotton Harness, General Counsel, South Carolina Coastal Council 4 (Nov. 14, 1992) (on file with the *Harvard Environmental Law Review*). Given the importance of this dialogue, and the way in which *Lucas* has focused on its results in takings jurisprudence, one would expect both the dialogue and the role of legislatures in defining nuisance law to continue.

114. Courts occasionally display greater sympathy to the inchoate values of natural resources and are willing to accord deference to the expert agencies charged with protecting them. Compare *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (holding that a landowner has no absolute and unlimited right to change the essential character of her land by using it for a purpose for which it was unsuited in its natural state) and *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (en banc) (recognizing public trust easement for purpose of preserving land in natural state) with S. 177, 103d Cong., 1st Sess. (1993) (bill to codify Executive Order 12,630 requiring federal agencies to perform takings analysis of all regulatory initiatives) and H.R. 1330, 103d Cong., 1st Sess. (1993) (bill providing, among other things, for automatic compensation of any owner of wetlands that have been classified as bearing critical significance to long-term conservation of the surrounding ecosystem). See also Sugameli, *Sound and Fury*, *supra* note 7, at 448 n.42 (state takings legislation). Courts also are not held hostage by special interests like legislatures are. See Epstein, *Seven Deadly Sins*, *supra* note 7, at 958–59 (arguing that requiring legislation to pass two hurdles is a welcome institutional barrier to special interest legislation, and that the imperfection of politics provides strong reason to put aside deference to legislators). For general polemics against the democratic branch of government, see Ausness, *Wild Dunes*, *supra* note 109, at 466 (arguing that courts have institutional advantage over legislatures in determining existing nuisance and property law: legislatures represent narrow special interests while courts are experienced in dealing with legal concepts and more likely to be neutral decision-makers). For a more neutral view, see Daniel A. Farber & Paul P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 905–06 (1991) (explaining that legislatures may be more legitimate in theory and capable in practice of defining public values than judges, but institutional insulation of judges and deliberative qualities stressed by republicanism empower common law judges to promote legal change in pursuit of public values).

115. See Richard Lazarus, *Changing Concepts of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 660–61 (1986) (arguing that substantive scope of both public and private nuisance law has

not diminished the relevancy of the doctrine. For example, courts have on various occasions required defendants to pay damages for air pollution,<sup>116</sup> abate water pollution,<sup>117</sup> stop discharging raw sewage into a body of water,<sup>118</sup> pay the cleanup costs of a permitted hazardous waste dump site,<sup>119</sup> abate exposure to toxic chemicals,<sup>120</sup> force the relocation of a feedlot,<sup>121</sup> provide for the private maintenance of a public road to control dust from coal haul trucks,<sup>122</sup> pay damages for contamination of well water,<sup>123</sup> and pay punitive damages for injuries caused by exposure to asbestos more than forty years earlier.<sup>124</sup> Courts have also used nuisance law to hold defendants liable for causing aesthetic harm by requiring the removal of an "unsightly eyesore" from a wooded mountain area.<sup>125</sup> One court has even held the United States government liable for failing to protect residents from the adverse effects of exposure to radioactive fallout from bomb tests.<sup>126</sup>

In short, nuisance is a vibrant common law doctrine which has been and continues to be used to protect land from harmful development.

There is simply no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land

willingly embraced environmental and natural resource concerns) [hereinafter Lazarus, *Changing Concepts*].

116. *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

117. *See, e.g., New York v. New Jersey*, 256 U.S. 296 (1921).

118. *Miotke v. City of Spokane*, 678 P.2d 803, 816 (Wash. 1984).

119. *New York v. Schenectady Chem. Co.*, 459 N.Y.S.2d 971 (1983).

120. *Wood v. Picallo*, 443 A.2d 1244, 1247 (R.I. 1982).

121. *Spur Indus., Inc. v. Del Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) (holding that maintenance of animal feedlot creates public nuisance entitling plaintiff to injunctive relief).

122. *West v. National Mines*, 285 S.E.2d 670 (W. Va. 1981), *discussed in* Gene W. Bailey II, Case Comment, *West v. National Mines: Creation of Private Nuisance By Use of Public Property*, 85 W. VA. L. REV. 263 (1983).

123. *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982) (awarding damages for contamination of culinary water wells by defendant's percolating oil well formation water); *see also Langan v. Valicopters*, 567 P.2d 218 (Wash. 1977) (awarding damages to organic farmer for loss of certification due to drifting of aerial pesticide spray).

124. *Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986).

125. *Allison v. Smith*, 695 P.2d 791, 794 (Colo. Ct. App. 1984) (holding that obnoxious debris, including stockpiled old cars, scrap metal, oil drums, and general litter, is actionable under nuisance theory). For an interesting discussion of traditional common law nuisance and its applicability to aesthetic harm, *see* Stephen Woodbury, *Aesthetic Nuisance: The Time Has Come to Recognize It*, 27 NAT. RESOURCES J. 877, 878 (1987) [hereinafter Woodbury, *Aesthetic Nuisance*].

126. *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984).



use and of technological abuse. Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means . . . . Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation—the operation of land fills, incinerators, sewage treatment facilities, activities at chemical plants, aluminum, lead and copper smelters, oil refineries, pulp mills, rendering plants, quarries and mines, textile mills and a host of other manufacturing activities . . . . Nuisance theory and case law is [sic] the common law backbone of modern environmental and energy law.<sup>127</sup>

Development is particularly harmful to barrier beaches and wetlands because, from an ecological perspective, both types of resources have their greatest value when left in their natural state. They are also among this country's most economically important<sup>128</sup> and fragile natural systems.<sup>129</sup> Their protection benefits society as a whole<sup>130</sup> both in terms of revenues realized and costs averted.<sup>131</sup> Allowing their destruction leads to public injury, usually in the

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127. WILLIAM RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.1, at 100 (1977), quoted in Woodbury, *Aesthetic Nuisance*, *supra* note 125, at 877 n.2.

128. The importance of coastal beach dune systems was recognized by the South Carolina legislature in the Beachfront Management Act. The "beach/dune system along the coast of South Carolina is extremely important to the people of the state." Beachfront Management Act, S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1993). In support of this conclusion, the state statute lists the functions that these systems provide for the state, such as protecting life and property by functioning as a storm barrier to dissipate wave energy, contributing revenue to the state's tourism industry, and providing habitat for numerous species of plants and animals and a healthful environment for the state's citizens. *Id.*

129. Beaches are particularly fragile ecosystems subject to the erosive force of ocean tides and waves and energy storms. *See generally amicus curiae* Brief in Support of Respondent, filed by Nueces County, Texas *et al.* at 4-11, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (No. 91-453), and sources cited therein (copy on file with the *Harvard Environmental Law Review*). Coastal erosion and migration has become even more pronounced and volatile as a result of sea level rise. *See* OFFICE OF WETLAND PROTECTION, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA-230-05-86-013, GREENHOUSE EFFECT, SEA LEVEL RISE, AND COASTAL WETLANDS (James G. Titus ed., 1988); JOHN R. CLARK, THE CONSERVATION FOUNDATION, COASTAL ECOSYSTEM MANAGEMENT: A TECHNICAL MANUAL FOR THE CONSERVATION OF COASTAL ZONE RESOURCES (1977); *see also* GEOPHYSICS STUDY COMMITTEE, NATIONAL RESEARCH COUNCIL, SEA LEVEL CHANGE 4 (1990) (predicting that "[o]ne hundred years from now it is likely that sea level will be [1.6 to 3.3 feet] higher than it is at present.").

130. The more people who engage in a commercial activity, the greater the opportunities for all to benefit, and the greater the scale returns. *See* Rose, *Comedy of the Commons*, *supra* note 17, at 774. The greatest value of these resources, therefore, is realized by society as a whole because of the opportunity for many individuals to benefit from them.

131. Wetlands perform valuable socioeconomic services which are lost when they

form of lost benefits.<sup>132</sup> Therefore, much of the value of coastal and wetlands resources lies in the commercial value of the functions they perform.<sup>133</sup>

The essence of the evolution of the nuisance doctrine is to respond to "changed circumstances or new knowledge [which] may make what was previously permissible no longer so."<sup>134</sup> As courts continue to apply the nuisance doctrine expansively,<sup>135</sup> its utility and appeal to state regulators will increase as well. Thus, nuisance law, far from being a limitation on state regulatory action as the *Lucas* Court intended,<sup>136</sup> may instead be a source of enabling authority for state legislatures and regulatory agencies. Indeed, because

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are converted to some other use. Wetlands function as the "farmlands" of the aquatic environment and as important wintering-over habitat and feeding grounds. Hope M. Babcock, *Federal Wetlands Regulatory Policy: Up to its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 309 (1991) (citing RALPH W. TINER, JR., U.S. DEP'T OF THE INTERIOR, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 13-27 (1984)). Further beneficial properties are maintenance of water quality, erosion control, discharge and recharge of ground water, and flood and storm surge damage control. *Id.* Wetland plants form the base of the food chain, supporting higher consumers such as commercially and recreationally important species of fish and wildlife. *Id.* The harvest of indigenous products such as timber, fish, shellfish, peat, cranberries, and wild rice, as well as recreational opportunities associated with bird watching, canoeing, hunting, and fishing, contributed \$25 billion to the economy in 1991, according to a recent report published by the National Audubon Society. NATIONAL AUDUBON SOCIETY, VALUING WETLANDS: THE COST OF DESTROYING AMERICA'S WETLANDS 29 (Deanne Kloepfer ed., 1994). When indirect and induced economic impacts are included, that figure rises to more than \$72 billion, supporting almost 1 million jobs. *Id.* The National Marine Fisheries Service estimated in 1983 that annual fishery loss due to estuarine wetland destruction was approximately \$208 million. RALPH W. TINER, JR., U.S. DEP'T OF THE INTERIOR, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 36 (1984). For a general discussion of wetland values, see *id.* at 13-25.

132. Conversion of wetlands or barrier beaches to private use or destruction of their natural functions means not only the loss of these valuable public functions, but also a reduction in returns of scale. See Rose, *Comedy of the Commons*, *supra* note 17, at 768.

133. For a general discussion of coastal habitat values, see NATIONAL COALITION FOR MARINE CONSERVATION, STEMMING THE TIDE OF COASTAL FISH HABITAT LOSS: PROCEEDINGS OF A SYMPOSIUM ON CONSERVATION OF COASTAL FISH HABITAT (Richard H. Stroud ed., 1992) [hereinafter STEMMING THE TIDE]. For a discussion of wetland values, see *supra* note 131. For a discussion on the difficulty of mitigating wetland losses by restoring damaged wetlands or creating new wetlands, see Babcock, *supra* note 131, at 333.

134. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992).

135. Lazarus, in his comprehensive article on the public trust doctrine, discusses gradual judicial elimination of restrictions on the use of the public nuisance doctrine: for example, no longer limiting its use to the attorney general; no longer requiring citizens to show special injury in order to maintain a public nuisance action; and freeing the doctrine from its limiting relationship to property law concepts and terminology. He concludes that this evolution makes the nuisance doctrine an attractive alternative to the public trust doctrine discussed at *infra* part III.B. See Lazarus, *Changing Concepts*, *supra* note 115, at 661-64.

136. See Sax, *Western Water*, *supra* note 86, at 944 (arguing that use of nuisance

the common law of nuisance is not static,<sup>137</sup> it provides a growing, not shrinking, opportunity for regulatory authorities to protect the nation's coastlines and wetland resources.<sup>138</sup>

*B. Background Principles of Property: A Look at the Common Law Doctrines of Custom and Public Trust*

The *Lucas* Court exempted from the new takings rule uses proscribed by "existing rules or understandings that stem from an independent source such as state law."<sup>139</sup> Most of the *Lucas* majority opinion focuses on the uses proscribed by state nuisance law. Little attention has been paid to a further source of guidance: state property law.<sup>140</sup> The *Lucas* opinion sheds no light on what background property principles the Court had in mind and whether those principles can support preserving land in its natural state.

This Article suggests that there are useful principles, like the maxim *sic utero tuo ut alienum non laedas*,<sup>141</sup> endogenous to the concept of property, that can be used to protect natural areas by

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doctrine will lead to more compensation because relatively few things are traditionally categorized as nuisances); cf. Humbach, *Nuisance*, *supra* note 9, at 3 ("After *Lucas*, . . . remedial statutes to improve the common law will now be subject to preemption by the common law," in an "extraordinary reversal of centuries-old roles").

137. "It is an area of the law that 'straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste.'" *Lucas*, 112 S. Ct. at 2914 n.19 (Blackmun, J., dissenting) (quoting WILLIAM RODGERS, JR., ENVIRONMENTAL LAW § 2.4, at 48 (1986)) (footnotes omitted).

138. Illustrating the point that the common law doctrine of nuisance is not static, the Supreme Court in *Euclid v. Ambler Realty Co.* said:

Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

272 U.S. 365, 387 (1926).

139. *Lucas*, 112 S. Ct. at 2900.

140. One exception to this is a recent article by Joseph L. Sax. Sax, *Western Water*, *supra* note 86, at 944, 951 (arguing that definitional/historical view of property rights which encompasses doctrines like public trust, may lead in a direction that the Court did not intend to go, sustaining government programs that diminish or abolish property rights in water).

141. "One should use her own property in such a manner as not to injure the interests of others."

restraining the behavior of private landowners.<sup>142</sup> Deconstruction of the concept of property may be a useful starting point for exploring the restraints on landowner behavior.

Although there is debate over whether the right to acquire, use, and transfer property is considered a natural,<sup>143</sup> fundamental<sup>144</sup> or civil right,<sup>145</sup> few would argue that the right is limitless.<sup>146</sup> Nuisance is one conceptual framework for defining restrictions on property rights; the concept of property is another.

Restrictions upon use and alienation of real property flow from a perceived need to avoid waste. Unlike most chattels, real property will outlast generations of owners. Professor Richard Epstein, an advocate of otherwise unrestricted property rights, argues that property is a fundamental civil right with clear and commonly understood rules.<sup>147</sup> He recognizes a variety of "sensible legal adaptations"

142. For a somewhat contrary view, see Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1441 (1993) (explaining that background principles of nuisance and property law do not include prescriptions requiring landowners to maintain property's natural conditions) [hereinafter Sax, *Understanding Lucas*].

143. See John Clough's discussion on whether John Locke's *Of Property* supports the position that the right to accumulate property is a natural right. JOHN H. CLOUGH, *PROPERTY: ILLUSIONS OF "OWNERSHIP"* 17-18 (1984) (citing JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 327-44 (Mentor ed., 1963)).

144. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*138-39 (1882), quoted in JOHN H. CLOUGH, *PROPERTY: ILLUSIONS OF OWNERSHIP* 29-30 n.4 (1984):

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land . . . . So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

145. See Epstein, *Property*, *supra* note 3, at 188 (arguing that property rights, regardless of their diversity, share two indicia of fundamental rights: universality and utility).

146. See SELVIN, *supra* note 18, at 30 ("But though property be thus protected, it is still to be understood, that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public.") (quoting JAMES KENT, 2 *COMMENTARIES ON AMERICAN LAW* 276 (O. Halsted ed., 1889)).

147. Epstein, *Property*, *supra* note 3, at 190-93; see also DAVID HUME, *A TREATISE OF HUMAN NATURE* 497 (L.A. Selby-Bigge ed., 1888) ("Property must be stable, and must be fix'd by general rules."), quoted in Epstein, *Seven Deadly Sins*, *supra* note 7, at 976 n.81. For a view of the rules of property as more malleable, see Sax, *Understanding Lucas*, *supra* note 142, at 1446 (property definitions continuously adjust to reflect new economic

of these standard rules to avoid negative externalities and waste.<sup>148</sup> Each of these adaptations embodies a restraint on a landowner's freedom to exercise her proprietary rights;<sup>149</sup> each also acts indirectly to protect resources from either physical destruction or over-consumption.

Epstein describes several examples of this type of adaptation—among them, laws preventing landowners from causing subsidence of neighboring property,<sup>150</sup> rules in communal agricultural societies that limit both membership in the society and the practices of members in the commons,<sup>151</sup> and oil and gas pooling systems<sup>152</sup> which require restrictions on private property use, such as well-spacing regulations or unitization<sup>153</sup> systems. He also recognizes the wisdom of the American West's complex system of water rights, which embodies a mix of private and collective restrictions, entitlements, and understandings at odds with traditional rules of private property ownership.<sup>154</sup>

A second source of restraints on the behavior of private landowners may lie in the realm of ethics. According to Professor Carol Rose, the concept of property includes "a normative 'deep structure'" that embraces "the qualities of restraint and responsibility."<sup>155</sup> Such environmental ethics can yield approaches to resource management that supplement or replace those of private property rights or bureaucratic authority.<sup>156</sup> Rose describes how legal holders

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and social structures to disadvantage of existing owners). See also Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393 (1991) (state courts' interpretations of public trust doctrine identify governmental duties to redefine existing private property rights where such rights threaten ecological values of natural areas) [hereinafter Rieser, *Ecological Preservation*].

148. Epstein, *Property*, *supra* note 3, at 188.

149. See *id.* But Epstein has expressed contradictory views about whether property rules should be changed to accommodate environmental concerns. Cf. Epstein, *Seven Deadly Sins*, *supra* note 7, at 976 (arguing that permanence, stability, and certainty are all regarded as virtues of a system of property rights, and should not be compromised on account of environmental issues).

150. Epstein, *Property*, *supra* note 3, at 195.

151. *Id.*

152. Epstein notes that virtually all systems of private property use a rule of first possession to assign particular things to particular individuals. See *id.* at 190. Pooling systems modify this rule substantially. *Id.* at 195–97.

153. A system under which individual owners of oil drilling rights pool their individual resources and agree to a system of collective management that limits the amount of drilling any individual owner can do on her own property. *Id.*

154. See *id.* at 195–97.

155. Rose, *Environmental Ethics*, *supra* note 11, at 28.

156. *Id.* at 7–14.

of property rights devise various artifices to limit individual uses of common property, such as fishing norms or "stinting"<sup>157</sup> of livestock. These limits are enforced by customs and norms, and have been adopted by common law courts.<sup>158</sup> In fact, entire bodies of common-property law have come to revolve around an ethic of "moderation, proportionality, prudence, and responsibility" toward others who are entitled to share in common resources.<sup>159</sup> Individual property rights embody these same normative characteristics.<sup>160</sup>

A third source of restraint on landowner conduct may reside in the communities that depend on the property. Professor Joseph Sax argues that this dependence reflects the fact that certain types of land fulfill important public functions. He describes several historical examples of private property being limited by some public claim or servitude, such as the requirement that land in frontier settlements be put to productive use within a reasonable time.<sup>161</sup> Such requirements advance the community's interests in that property. Professor Sax suggests a usufructuary model of property as a means of understanding and effectuating those rights.<sup>162</sup>

All three scholars show that the concept of property contains generally accepted restraints on the rights of landowners to alter their property's physical integrity.<sup>163</sup> To Epstein, these restraints may originate in the rational desire of landowners to avoid waste and negative externalities; to Rose, they are found in the normative structure inherent in the concept of property; to Sax, they lie in some superior claim to the land held by the public.

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157. A practice, which Rose characterizes as both "widespread" and "long-lived," under which individuals limit their use of common property so that the collective uses do not destroy the whole. *Id.* at 26-27.

158. *See id.*

159. *Id.* at 27.

160. *See id.* at 27-28 (theorizing that individual property-holders rely on the recognition and acquiescence of others, and that property law assumes neighborliness and attentiveness to needs of others in use of one's own exclusive property).

161. *See Sax, Understanding Lucas, supra* note 142, at 1453.

162. *See id.* at 1452-54.

163. The examples used by Epstein, Rose, and Sax concern individual property holders seeking to use a natural resource. Possession (and the concurrent right to exclude others) is sought. Restraints must be placed on the possessory and usufructuary rights of these individuals to avoid waste, negative externalities and antisocial behavior. This Article examines public rights as a source of restraint on private behavior and to what extent the public can gain access to private property. For a look at the rights and interests of the "unorganized public," and the extent to which those rights or interests restrain the behavior of private property holders, see Rose, *Comedy of the Commons, supra* note 17.

However, none of the three addresses the question of whether a landowner can be compelled to leave her property in its natural state. Under their respective views of property, a landowner could deplete significantly (perhaps completely) the resource value of her land so long as it does not cause waste, violate normative standards, or conflict with some other community need. Sax's ecological view of property may come the closest, by showing that land in its unaltered state is performing important public services.<sup>164</sup> He suggests a complete re-altering of property law in response to this concern.<sup>165</sup>

Perhaps a more modest proposal might involve finding whether property law in its current form can be used to prevent a landowner from altering her land's natural condition because of the important public services the land may offer. To answer that question, we turn to an examination of two specific common law property doctrines: custom and public trust.

### 1. *The Common Law Doctrine of Custom*<sup>166</sup>

A variety of common law doctrines have been employed over time to prevent the conversion of public land to private use, or, alternatively, to allow public access to private land.<sup>167</sup> Similarly, these doctrines could be used to support government regulations

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164. Sax, *Understanding Lucas*, *supra* note 142, at 1442.

165. Sax favors establishing a system of usufructuary rights that subjects private ownership to "some public claim or servitude" in order to bring the transformative economy into greater harmony with an ecological perspective and the economy of nature. *See id.* at 1452-55.

166. For a thorough and illuminating discussion of the origins and reach of the common law doctrine of custom, see Rose, *Comedy of the Commons*, *supra* note 17, at 758-61, 766-71. *See also* Andrea C. Loux, Note, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183 (1993) [hereinafter Loux, *Ancient Regime*].

167. Other common law doctrines traditionally used to support public claims of access to roads and waterways are prescription (actual, continuous, uninterrupted, adverse use under claim of right for period of time prescribed by law), implied dedication (from regular use of property by public in reliance on owner's acquiescence in use), adverse possession (continuous, open, notorious, hostile, and exclusive use of property of another), and public trust. *See generally* Rose, *Comedy of the Commons*, *supra* note 17, at 723-27.

The federal navigational servitude "permits the federal government to displace or destroy state-recognized property rights in navigable waters . . . without having to pay compensation." Joseph L. Sax & Robert H. Abrams, *LEGAL CONTROL OF WATER RESOURCES* 96 (1986), *quoted in* David B. Hunter, *An Ecological Perspective on Property: A Call For Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 360 (1988) [hereinafter Hunter, *Ecological*].

restricting destruction of that land. The ancient doctrine of custom has intriguing possibilities in this context.<sup>168</sup> Although the doctrine of custom traditionally has been used in the United States only to gain public access to coastal resources, such as barrier beaches, its historic uses outside of the United States have been broader. Unfortunately, constraints inherent in the doctrine and its lack of widespread acceptance may limit it to a "background principle" of only narrow utility in but a few jurisdictions.

Customary claims originated in early English law,<sup>169</sup> which enabled residents of specific localities<sup>170</sup> to claim the rights to use a variety of land held in common as "customs of the manor."<sup>171</sup> To qualify as a customary right, the custom must have existed without dispute for a time that ran beyond memory, and had to be both well-defined and "reasonable."<sup>172</sup> Uses subject to ancient customary rights included manorial tenants' rights to graze animals, gather wood, cut turf on the manor commons, and engage in a variety of recreational activities.<sup>173</sup> Other customary rights recognized by English common law courts included market and water rights.<sup>174</sup>

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*Perspective*]. But see *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding that navigational servitude does not shield federal government from Fifth Amendment).

168. The judicial doctrine of custom is "the doctrine by which ancient customs practiced by a definite community in a distinct geographic locale, though contrary to the common law, are recognized by royal judges to constitute local common law for the land and people of the region." Loux, *Ancient Regime*, *supra* note 166, at 183.

169. In British jurisprudence, a general custom, the "custom of the country," is the common law itself. See Rose, *Comedy of the Commons*, *supra* note 17, at 742 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES \*67 ("General customs, which are the universal rule of the whole kingdom . . . form the common law.")). For a detailed history of the doctrine of custom in English jurisprudence, see Loux, *Ancient Regime*, *supra* note 166.

170. One of the more interesting aspects of the doctrine, according to Professor Rose, is that it vests rights in the unorganized public, as opposed to individuals. She notes, however, that although these communities were informal and indefinite, they nevertheless were capable of self-management. See Rose, *Comedy of the Commons*, *supra* note 17, at 742.

171. Custom is recognized by common law courts as *lex loci* or local common law. See Loux, *Ancient Regime*, *supra* note 166, at 186.

172. Rose, *Comedy of the Commons*, *supra* note 17, at 740; see also Starr, *Coastal Land*, *supra* note 71, at 142 n.202 (proof of customary usage requires that use be (1) ancient, (2) exercised without interruption, (3) peaceable and free from dispute, (4) reasonable, (5) certain, (6) obligatory, and (7) not repugnant to other customs or laws) (paraphrasing William Blackstone).

173. Professor Rose finds it noteworthy that the surviving customary rights are those useful for recreational purposes. See Rose, *Comedy of the Commons*, *supra* note 17, at 740-41.

174. See, e.g., *Race v. Ward*, 4 El. & Bl. 702, 119 Eng. Rep. 259 (Q.B. 1855) (holding no trespass action available against inhabitants for violating an enclosure decree cutting them off from well, based on custom and fifty years of use), cited in Loux, *Ancient Regime*, *supra* note 166, at 205. In a more recent application, custom doctrine prevented



While early nineteenth-century American courts seemed willing, albeit reluctant, to acknowledge a limited doctrine of customary claims,<sup>175</sup> by the end of the century, courts appeared generally hostile to such claims.<sup>176</sup> Today, only a handful of states, most notably New Hampshire,<sup>177</sup> Oregon<sup>178</sup>, Texas,<sup>179</sup> and Hawaii,<sup>180</sup> recognize customary claims explicitly,<sup>181</sup> and then only with respect to beach access.<sup>182</sup> In such jurisdictions, custom may be considered a background principle of the law of property, because the custom

a landowner from blocking access to his land by fishermen, who had for many years dried their nets on it. *Mercer v. Denne*, (1904) 2 Ch. 534 (Farwell, J.), *aff'd* (1905) 2 Ch. 538 (C.A.), *cited in* Loux, *Ancient Regime*, *supra* note 166, at 186-87.

175. See Rose, *Comedy of the Commons*, *supra* note 17, at 741. But see Steven Hahn, *Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South*, 26 RADICAL HIST. REV. 37 (1982) (arguing that from earliest settlement until late in the 19th century, custom and law circumscribed and widened use rights) (copy on file with the *Harvard Environmental Law Review*) [hereinafter Hahn, *Hunting*]. According to Hahn, the customary rights could not be abrogated by private title: "The woods were put here by our Creator for a benefit to his people . . . [endowing] custom to the range [with] legal, moral, and bible [sanction]." *Id.* at 55, (citing *Carroll Free Press*, May 8, 1885, June 5, 1884, June 25, 1885).

176. Rose, *Comedy of the Commons*, *supra* note 17, at 741.

177. See *Nudd v. Hobbs*, 17 N.H. 524 (N.H. 1845) (recognizing customary right of passage), *cited in* Rose, *Comedy of the Commons*, *supra* note 17, at 739 n.135; see also *Knowles v. Dow*, 22 N.H. 387, 409 (N.H. 1851) (upholding public right of access to collect seaweed based on custom), *cited in* Hunter, *Ecological Perspective*, *supra* note 167, at 370 n.280.

178. See *State ex rel. Thornton v. Hay*, 462 P.2d 671, 677 (Or. 1969) (holding custom as basis for public access to dry sand beach); see also *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) (city's denial of permit to build seawall on oceanfront property does not effect a taking, where public use of dry sand areas is so notorious that notice of such custom must be presumed).

179. See *Arrington v. Mattox*, 767 S.W.2d 957, 958-59 (Tex. Ct. App. 1989), *cert. denied*, 493 U.S. 1073 (1990) (holding that public easements acquired by custom do not effect taking); *Matcha v. Mattox ex rel. People*, 711 S.W.2d 95, 101 (Tex. Ct. App. 1986), *cert. denied*, 481 U.S. 1024 (1987) (finding that an established easement on privately owned beach held to be public through prescription, dedication, and custom).

180. See *In re Ashford*, 440 P.2d 76 (Haw. 1968) (holding that Hawaiian custom determines location of seaward boundaries), *cited in* Hunter, *Ecological Perspective*, *supra* note 167, at 370 n.280.

181. See *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769, 772-73 (D. V.I. 1974), *aff'd* 529 F.2d 513 (3d Cir. 1975) (finding public recreation area on beach established by custom); *State ex rel. Haman v. Fox*, 594 P.2d 1093, 1101 (Idaho 1979) (holding custom valid in Idaho although elements not met with regard to disputed parcel). Other courts have implied limited recognition of custom, noting the *Thornton* decision with favor. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984), *cert. denied*, 469 U.S. 821 (1984); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974); *Gion v. City of Santa Cruz*, 465 P.2d 50, 59 (Cal. 1970). For these and other citations, see Alfred T. Clayton, Jr., Casenote, *Oregon's 'New' Doctrine of Custom: McDonald v. Halvorson*, 26 WILLAMETTE L. REV. 787, 793 n.38 (1990).

182. Most states appear to have taken no position on the doctrine. Only a few jurisdictions have rejected it. See, e.g., *Bell v. Town of Wells*, 557 A.2d 168, 179 (Me. 1989); *Leabo v. Leninski*, 438 A.2d 1153, 1156-57 (Conn. 1981); *Smith v. Bruce*, 244

must be based on a use so "notorious" as to be obvious to all.<sup>183</sup> There are inherent limitations in the doctrine, however, which may constrain the doctrine's versatility even in these few state jurisdictions.

First, the requirement for uninterrupted practice of a custom may be a serious disability to the doctrine's use as an enabling principle. Unlike the public trust doctrine, which can lie dormant for centuries before being resurrected,<sup>184</sup> custom requires that the public's use of the land be uninterrupted for as long as anyone can remember.<sup>185</sup> Customary rights may lapse from disuse and can be easily defeated by determined landowners.<sup>186</sup> As a result, custom presents serious problems of proof, especially in areas undergoing rapid development.<sup>187</sup>

Another potentially disabling factor is the restriction of the custom doctrine in this country to beaches. Unlike the public trust doctrine, which has grown increasingly amphibious over time,<sup>188</sup> custom has stayed rooted in the sand. If, however, one follows the logic of Professor Rose's analysis of the doctrine's foundation, and her conclusions about "inherently public property," an argument can be made for the doctrine's potential application to a broader array of land types.<sup>189</sup>

According to Rose, if a piece of physically monopolizable land has greatest value when held in common, the public's claim is inherently superior to that of the private landowner.<sup>190</sup> As the ancient doctrine of custom was developed to preserve the unorganized public's rights in those lands, it follows that the doctrine can be applied to any qualifying land. Trails across private property

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S.E.2d 559, 569 (Ga. 1978); *Department of Natural Resources v. Mayor and Council of Ocean City*, 332 A.2d 630, 638 (Md. 1975).

183. See, e.g., *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993).

184. See, e.g., *City of Los Angeles v. Venice Peninsula Properties*, 644 P.2d 792 (Cal. 1982), *rev'd sub nom. Summa Corp. v. California ex rel. State Land Comm'n*, 466 U.S. 198 (1984) (public trust doctrine held not to apply). See also *infra* part III.B.2.a.

185. See *supra* note 172 and accompanying text.

186. As an example, consider Yale University's practice of closing its gates once a year to prevent the establishment of customary use.

187. For a more thorough discussion of the problems associated with the doctrine of custom, see Jonathan M. Hoff, Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 UCLA L. REV. 1049, 1057-60 (1981) [hereinafter Hoff, *Public Beach Access*].

188. See *infra* part III.B.2.a. and accompanying notes.

189. For a more in-depth discussion of this concept, see *infra* part III.B.2.b.

190. Rose, *Comedy of the Commons*, *supra* note 17, at 774.

and portages around rapids on private land are but two potential applications, both of which appear analogous to the beach access rights that Rose discusses.<sup>191</sup> As discussed elsewhere in this Article, the geographic range of custom could potentially encompass areas where people have hiked or recreated for generations.<sup>192</sup> However, given the historic resistance to custom doctrine by many states and its limited, infrequent use, it seems unlikely that many jurisdictions will be inclined to expand its geographic scope, no matter how compelling the doctrinal basis.

Another limitation of custom lies in its focus; unlike the public trust doctrine, which applies to the land itself,<sup>193</sup> custom doctrine applies only to the uses to which the land has been put. Its principles arose from habits of use and understandings about local custom,<sup>194</sup> not from any particular value of the land concerned.<sup>195</sup> This may be a distinction without a difference, since ruining the land would necessarily interrupt or prevent its customary use. By this means, custom can sometimes achieve the same goal as the public trust doctrine, by preventing the land's destruction.

If a customary use can be established for a piece of land,<sup>196</sup> the doctrine can be applied to preserve the land for that use without

191. According to Professor Rose, beaches are the perfect fit for this paradigm, because of the value added to the property by public recreation and the opportunity for private holdout. *See id.* at 779–81. But this does not mean that other land, such as wetlands, might not qualify. *See infra* part III.B.2.b.

192. *See infra* part III.B.2.b.

193. *See infra* part III.B.2.a.

194. According to one scholar, the greatest significance of custom lies in the fact that its origins and legitimacy derive from the *praxis* (or use) of the community. Loux, *Ancient Regime*, *supra* note 166, at 183.

195. "It was the public's habit of use, rather than anything unique about the property *ab initio*," that subjected the property to custom. Rose, *Comedy of the Commons*, *supra* note 2, at 759–60, *citing* *President of Cincinnati v. Lessee of White*, 31 U.S. (6 Pet.) 431, 439 (1832) (holding that prolonged public usage sufficient to dedicate land to public if interruption of use would substantially affect public accommodation).

196. In England, once a practice or use was recognized by a common law court as the local custom of an area, it automatically became recognized by all common law courts without proof of the custom. *See* Loux, *Ancient Regime*, *supra* note 166, at 187. *But see* *McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989) (modifying rule of law set down in *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), that custom affirmed public right to make recreational use of Oregon's coastal beaches to apply only to beaches similarly situated to the beach in *Thornton*). *See also* Alfred Clayton, Jr., Note, 26 WILLAMETTE L. REV. 787, 789 (1990) (arguing that *McDonald* modified *Thornton* such that application of doctrine of custom to Oregon coast will require tract by tract litigation).

effecting a taking.<sup>197</sup> A distinct, although not undisputed, potential advantage of custom over other common law property doctrines, such as prescription, implied easement, or adverse possession, is that it may be applied to a large region, rather than a single tract of land.<sup>198</sup> Thus, once custom is found to apply to a given beach, then it should automatically apply to all other beaches in the state.

The common law doctrine of custom offers an intriguing opportunity to restrict the freedom with which private landowners can alienate public rights in certain property. As the essence of the doctrine is the "understandings of our citizens,"<sup>199</sup> custom would appear to be one of the *Lucas* Court's "background principles of property" that "inhere[s] in the title itself."<sup>200</sup> As such, it could be used where applicable to support "measures newly enacted by the State in legitimate exercise of its police powers"<sup>201</sup> on property impressed with a customary usufruct. Unfortunately, the use of custom is inhibited both by limitations in the doctrine itself, and by its current narrow acceptance in this country. The public trust doctrine, as the next section illustrates, is considerably more versatile.

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197. *Stevens v. Cannon Beach*, 854 P.2d 449 (Or. 1993) (holding that denial of a permit to build seawall was not taking where public right to use an ocean beach was established by custom). *See also* *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. Ct. App. 1989), *cert. denied*, 493 U.S. 1073 (1990) (holding that requiring owner to remove obstacles to access beach under terms of Open Beaches Act not taking, since Act involved enforcement of easements previously acquired through prescription, dedication, and custom).

198. *See* *Starr, Coastal Land*, *supra* note 71, at 143 (citing *Thornton*, 462 P.2d at 675-76 (holding that established custom can be proven with reference to larger region)). This feature lessens the burden on the state by avoiding expensive tract-by-tract litigation. *See id.* But *see McDonald*, 780 P.2d 714 (limiting geographic reach of *Thornton* to similarly situated beaches); Hoff, *Public Beach Access*, *supra* note 187, at 1058 (enforcement requires litigation on tract-by-tract basis, resulting in haphazard and costly enforcement of public rights).

199. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

200. *Id.* at 2900.

201. *Id.* at 2899.

## 2. *The Public Trust Doctrine*<sup>202</sup>

The public trust doctrine is a controversial<sup>203</sup> common law property concept that treats tidelands and certain other lands and waters<sup>204</sup> as "held in trust" for the citizens of various states, and requires that they be used only for the public's interests. The California Supreme Court explained the broader meaning of this responsibility in *National Audubon Society v. Superior Court*:

[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right

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202. Although many articles have been written on the public trust doctrine, the definitive work remains Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *Public Trust*]. But see Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 *passim* (1991) (criticizing Sax's work as forestalling more promising approaches). For an exhaustive list of other articles on public trust (and a highly critical look at the doctrine itself), see Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 239 n.1 (1992) [hereinafter Cohen, *Economic Perspective*]. For an even more voluminous list, see Valerie B. Spalding, *The Pearl in the Oyster: The Public Trust Doctrine in North Carolina*, 12 CAMPBELL L. REV. 23, 24 n.4 (1989) [hereinafter Spalding, *Pearl*].

203. Professor Wilkinson gives two basic reasons for the intensity of debate over the public trust doctrine: first, the doctrine focuses on water-based property, which is among the most valued of our natural resources in both economic and conservation terms; second, the manner in which the doctrine's application causes a "quick collision between two treasured sets of expectancy interests—private property owners and the general public." Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989) [hereinafter Wilkinson, *Headwaters*].

204. Courts have long recognized the special status of water rights:

[F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows . . . . The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908), *quoted in* Helen Ingram & Cy R. Oggins, *The Public Trust Doctrine and Community Values in Water*, 32 NAT. RESOURCES J. 515, 527–28 (1992).

of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust . . . .<sup>205</sup>

The doctrine is most often applied to coastal or riparian land resources.<sup>206</sup> Over time, the doctrine has served as both a source of and a limitation on state legislative and administrative powers over such lands.<sup>207</sup> Both of these public trust functions are considered essential underpinnings of a responsible government. As a Wisconsin court put it:

The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever, the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capital to a private purpose.<sup>208</sup>

Unlike custom, the doctrine of public trust has shown enormous vitality and flexibility<sup>209</sup> in the modern era.<sup>210</sup> The *Lucas* decision could give the doctrine even more prominence,<sup>211</sup> as public

205. *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 724 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

206. *See, e.g., id.* (holding that public trust doctrine imposes duty on state to consider trust uses in allocating water resources).

207. The public trust doctrine will cause a court to "look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate a resource [held available for the general public] to more restricted uses *or* to subject public uses to the self-interest of private parties." Sax, *Public Trust*, *supra* note 202, at 490; *see also* Ralph W. Johnson, *Oil and the Public Trust Doctrine in Washington*, 14 U. PUGET SOUND L. REV. 671, 694-96 (1991) (discussing authorizing and limiting powers of public trust doctrine).

208. *Priewe v. Wisconsin State Land & Improvement Co.*, 67 N.W. 918 (Wis. 1896), *aff'd on reh'g*, 79 N.W. 780, 781 (Wis. 1899) (voiding state law authorizing draining of lake for private development).

209. At least one scholar has complained that this flexibility, brought about by the zeal and imagination of the doctrine's proponents, has taken public trust well beyond its legal roots in property, thereby upsetting public expectations. *See* James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) [hereinafter Huffman, *Public Trust Doctrine*].

210. Its continued strength is clearly evident; the public trust doctrine has been identified as a principle vehicle for the ongoing reformulation of American property law. *See, e.g.,* Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269, 1289-90 (1993); Rieser, *Ecological Preservation*, *supra* note 147.

211. *But see* Lazarus, *Changing Concepts*, *supra* note 115, at 713-16. Professor Lazarus argues that the public trust doctrine has been weakened by recent Supreme Court decisions, particularly *Summa Corp. v. California ex rel. State Land Comm'n*, 466 U.S. 198 (1984). *See* Lazarus, *Changing Concepts*, *supra* note 115, at 692 n.368. But several

trust principles may well be employed by government regulators<sup>212</sup> in their attempts to justify their actions under the *Lucas* takings rule.<sup>213</sup>

*a. Origins<sup>214</sup> and Some Modern Uses of the Public Trust Doctrine*

The public trust doctrine's origins date back to Roman law, which held that the air, the streams and rivers, the sea, and the shoreline were common to all, and that everyone had an equal right to their use.<sup>215</sup> More recently, English common law gave these resources to the King,<sup>216</sup> but impressed upon regal ownership the duty to hold them for the people.<sup>217</sup>

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bases of his argument—current takings jurisprudence and liberalized views of state declarations of police power authority—have been called into question by the Court in its *Lucas* decision. See *id.* at 675–76.

212. See, e.g., *Kreiter v. Chiles*, 595 So. 2d 111 (Fla. Dist. Ct. App. 1992), *cert. denied*, 113 S. Ct. 325 (1992) (holding that state's denial of private dock on land held in public trust not taking for which private owner may be compensated).

213. Potential employment of the doctrine to prevent alienation of trust property for private use and to bolster governmental regulatory authority over certain property, such as coastal areas and tidelands, has caused anxiety among some commentators. See Lazarus, *Changing Concepts*, *supra* note 115 (public trust doctrine obscures analysis and makes reworking of natural resources law more difficult); Cohen, *Economic Perspective*, *supra* note 202, at 276 (“[R]esurrection and transformation of the ancient English public trust doctrine into a device to abrogate private property rights is a piece of disingenuous gimmickry which does its champions no honor.”).

214. For a thorough discussion of the origins of the public trust doctrine, see Lazarus, *Changing Concepts*, *supra* note 115. See also Huffman, *Public Trust Doctrine*, *supra* note 209 (origins found in property, not trust, constitutional or some other legal taxonomy); Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515 (1989) (public trust is fundamental doctrine in American property law, assuming in some states character of implied constitutional principle); Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989) (doctrine rooted in state constitutions). For a more critical view, see Cohen, *Economic Perspective*, *supra* note 202, at 275 (modern public trust doctrine rests on inapposite English precedent).

215. THE INSTITUTES OF JUSTINIAN 67–70 (T. Cooper ed. & G. Harris trans., 1812), *cited in* Brent R. Austin, Comment, *The Public Trust Misapplied: Phillips Petroleum v. Mississippi and the Need to Rethink an Ancient Doctrine*, 16 ECOLOGY L. Q. 967, 969 n.10 (1989) [hereinafter Austin, *Public Trust*]. But see Cohen, *Economic Perspective*, *supra* note 202, at 249–51 (suggesting that public trust doctrine advocates have “an exaggerated notion of the extent of communal rights in Roman law and practice”).

216. See Lazarus, *Changing Concepts*, *supra* note 115, at 635. Professor Cohen points out that the English public trust doctrine acted as a constraint only on private property owned by the King for his own benefit. Therefore, he finds the “original motivation of the doctrine” to be “completely inapposite to our modern republican form of government,” in which there is no need to distinguish between property held by the government for the benefit of the governed and that held for the benefit of the governors, as the latter category is a “null set.” See Cohen, *Economic Perspective*, *supra* note 202, at 252.

217. A description of those public trust rights in English common law that were

After the American Revolution, the thirteen former colonies inherited the public trust doctrine among many other legal principles.<sup>218</sup> The doctrine of public trust passed to new states<sup>219</sup> of the Union under the Equal Footing Doctrine.<sup>220</sup> As the new country's boundaries pushed south and west, Spanish, Mexican, and French law exerted their influence on the shape of American public trust doctrine.<sup>221</sup> By the late 1880s, the doctrine had significantly expanded from its Roman and English roots.<sup>222</sup>

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passed on to 18th-century American legal scholars can be found in Sir Matthew Hale's *De Jure Maris* and *De Portibus Maris* and in his explication of public rights in royal and private property. See SELVIN, *supra* note 18, at 24–27; see also Lazarus, *Changing Concepts*, *supra* note 115, at 636 (for more information on Hale's contribution to American public trust theory).

218. Susan D. Baer, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385, 389 (1988); see also *Shively v. Bowlby*, 152 U.S. 1, 48–49 (1894) (citing *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 409–11 (1842)). But see Paul S. Reinsch, *The English Common Law in the Early American Colonies*, cited in 31 BULL. OF THE U. OF WIS.: ECON., POL. SCI., AND HIST. SERIES 393, 400 (1899) (explaining that “the legal theory of transfer” of English common law to the colonies was far from linear).

219. Prior to each state's incorporation, its submerged lands were held in trust by the federal government. Once the titles to such lands were vested in a state, all federal sovereignty over them was extinguished. See Austin, *Public Trust*, *supra* note 215, at 969–70; see also *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984).

220. Under the Equal Footing Doctrine, each state succeeded on an equal footing with all others to the rights of sovereignty, jurisdiction, and eminent domain. See *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212, 223 (1845); see also *Montana v. United States*, 450 U.S. 544, 551 (1981); *Borax Consol. v. Los Angeles*, 296 U.S. 10, 15 (1935); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (states admitted into Union after adoption of Constitution granted same rights as original States in tide waters and lands below high water mark); Wilkinson, *Headwaters*, *supra* note 203, at 444–45 nn.81–82; Carol Kamm, Note, *Public Trust, Farmland Protection and the Connecticut Environmental Protection Act*: Red Hill Coalition, Inc. v. Town Plan and Zoning Comm'n, 23 CONN. L. REV. 811, 823 n.68 (1991).

221. In Spanish and Mexican law, the public trust doctrine extended not only to tidelands, but also to pueblo common lands and to fresh waters flowing through the pueblo. “The pueblo water-rights doctrine holds that American cities that originated as Spanish pueblos have a paramount right to use water naturally occurring within the old pueblo limits to supply the needs of the city and its inhabitants.” SELVIN, *supra* note 18, at 219. The doctrine was enunciated as early as 1881, in *Feliz v. City of Los Angeles*, 58 Cal. 73, 78–80 (1881), and was used as recently as 1975 by Los Angeles to enjoin San Fernando from extracting water underlying Los Angeles. See *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199 (1975). See generally SELVIN, *supra* note 18, at 219–25. In the last few decades it has been applied in New Mexico as well. See *Cartwright v. Public Service Co.*, 343 P.2d 654 (1959) (incorporating doctrine of pueblo water rights into New Mexico's jurisprudence). The implications of this doctrine for public trust jurisprudence in California and New Mexico will be the subject of a future article by the author of this Article.

222. See SELVIN, *supra* note 18, at 147. During this period state courts sanctioned not only the devolution of trust properties into private ownership (provided the states did not relinquish regulatory control), but also uses of trust property far beyond those



In the early days of this country, the public trust doctrine was most often used to prevent states from alienating publicly held resources to private interests.<sup>223</sup> Its application widened during the nineteenth century, reflecting the changes in the country's economic and physical conditions.<sup>224</sup> Since the publication in 1970 of Professor Sax's vanguard article on the subject,<sup>225</sup> the public trust doctrine has become newly prominent in environmental litigation,<sup>226</sup> particularly at the state level.<sup>227</sup> Modern uses of the doctrine by private<sup>228</sup> and public<sup>229</sup> litigants have included preventing state and federal governments<sup>230</sup> from transferring title over publicly held

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contemplated by Lord Hale, Blackstone, or Joseph Angell, in order to further the nation's economic growth and changing political and economic needs. *See id.* at 148-50.

223. *See, e.g.,* *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842) (applying public trust doctrine to block private claim to shellfish beds); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), *aff'd sub nom. United States v. Illinois Cent. R.R.*, 154 U.S. 225 (1894) (applying public trust doctrine to block conveyance of Lake Michigan lakebed to private railroad); *see also* Johanna Searle, Note, *Private Property Rights Yield to the Environmental Crisis: Perspective on the Public Trust Doctrine*, 41 S.C. L. REV. 897 (1990).

224. *See* SELVIN, *supra* note 18, at 5 (19th-century courts fashioned property law in general, and public trust doctrine in particular, to expedite economic growth).

225. Sax, *Public Trust*, *supra* note 202.

226. A major reason for the doctrine's resurgence is that it seems to enable litigants to sidestep the Takings Clause. James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVT'L. L. 171, 189-92 (1987) [hereinafter Huffman, *Myth of Public Rights*].

227. Several states have recognized the applicability of the public trust doctrine to coastal resources. *See, e.g.,* *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984); *see also* Charles M. Naselsky, Note, *Public Trust Doctrine—Beach Access*, 15 SETON HALL L. REV. 344 (1985).

228. One of the more famous public trust cases brought by a nongovernmental litigant is *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (applying public trust doctrine to prevent Los Angeles from draining non-tidal tributaries of navigable lake).

229. Courts generally affirm government reliance on the public trust doctrine to justify the exercise of authority over natural resources. States have successfully used the doctrine to acquire standing to seek injunctive relief for the protection of trust resources, *Bortz Coal Co. v. Air Pollution Comm'n*, 279 A.2d 388, 396 (Pa. Cmwlth. 1971), *appeal after remand*, 299 A.2d 670 (Pa. Cmwlth. 1973); *State v. Deetz*, 224 N.W.2d 407, 413 (Wis. 1974); *Potomac Sand & Gravel Co. v. Maryland*, 293 A.2d 241 (Md. 1972) (halting quarry in wetland under public trust doctrine), or to sue for monetary relief. *State Dep't of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1065-67 (D. Md. 1972); *New Jersey Dep't of Env'tl. Protection v. Jersey Cent. Power & Light Co.*, 308 A.2d 671, 673-74 (N.J. Super. Ct. 1973), *rev'd on other grounds*, 351 A.2d 337 (N.J. 1976). One court even allowed the doctrine to be used to eliminate any laches challenge to a state enforcement action. *See Corvallis Sand & Gravel Co. v. State Land Board*, 439 P.2d 575, 578 (Or. 1968). *But see* *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (holding that public trust doctrine does not eliminate need to comply with federal statute of limitations).

230. *Sierra Club v. Department of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975) (government has duty through public trust to protect national parks). For some general

resources, and halting the conversion of trust property from one use to another.<sup>231</sup>

The public trust doctrine has developed at the state level<sup>232</sup> without interference by the U.S. Supreme Court.<sup>233</sup> The first reported judicial application of the doctrine in this country was in 1810, when a Pennsylvania court employed the public trust rationale to deny a private claim to fishing rights in the Susquehanna River.<sup>234</sup> Several similar cases in the original thirteen states quickly followed suit.<sup>235</sup>

The "lodestar"<sup>236</sup> Supreme Court case applying the public trust doctrine is *Illinois Central Railroad Co. v. Illinois*.<sup>237</sup> In that case,

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insights into the federal public trust doctrine, see Wilkinson, *Headwaters*, *supra* note 203, at 454-64; J. Wallace Malley, Jr. & Jeffrey M. Silverstein, *The Public Trust Doctrine and Federal Condemnation: A Call for Recognition of a Federal Common Law*, 15 VT. L. REV. 501, 519-29 (1991); Baer, *supra* note 218. See also *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (public trust gives state right to sue vessel owner for oil spill damage); *United States v. 1.8 Acres*, 523 F. Supp. 120, 124 (D. Mass. 1981) (public trust in land below low water mark must be preserved).

231. See, e.g., *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1986) (preventing state from converting public park into ski resort).

232. Most of the states that recognize the public trust doctrine have been riparian doctrine states (e.g., Illinois, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New York, Pennsylvania, Rhode Island, and Wisconsin). Some Western prior appropriation doctrine states recognize it as well, including California, Idaho, Montana, North Dakota, and Washington. Other states recognize the doctrine statutorily, such as Maine, Michigan, Pennsylvania, and Tennessee. See Peter N. Davis, *Protecting Waste Assimilation Streamflows by the Law of Water Allocation, Nuisance, and Public Trust, and by Environmental Statutes*, 28 NAT. RESOURCES J. 357, 378-79 nn.117-19 (1988) [hereinafter Davis, *Environmental Statutes*]; see also *infra* note 241.

233. See, e.g., *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). But see *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198 (1984) (rejecting state's trusteeship claim in tidelands originating in private Mexican land grants because state failed to assert trusteeship rights during federal patent hearings).

234. See *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810) (extending the application of the public trust doctrine to fresh inland waters); see also *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & Rawle 71, 79 (Pa. 1826); SELVIN, *supra* note 18, at 33-36, and cases cited therein.

235. See, e.g., *Commonwealth v. Alger*, 7 Mass. (1 Cush.) 53 (1851) (applying doctrine to limit ability of riparian proprietors to construct wharves impeding public's right of free passage); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) (applying doctrine to pre-Revolutionary grant of title to oyster bed). For a discussion of early state public trust cases, see NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, *LEGAL ISSUES IN PUBLIC TRUST ENFORCEMENT* 7-15 (1977).

236. See Sax, *Public Trust*, *supra* note 202, at 489; see also Wilkinson, *Headwaters*, *supra* note 203, at 450 ("Justice Stephen J. Field's opinion . . . belongs on any short list of great natural resource opinions.").

237. 146 U.S. 387 (1892). After this decision, many states issued similar rulings. See, e.g., *State v. Black River Phosphate Co.*, 13 So. 640, 648 (Fla. 1893) (holding that state cannot transfer navigable waters and soil beneath them, but must hold them for public

Justice Field applied the doctrine to void a grant of a portion of the Lake Michigan lakebed:<sup>238</sup> "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."<sup>239</sup> *Illinois Central* remains one of the most comprehensive statements of the public trust doctrine.<sup>240</sup>

The most recent pronouncement by the Supreme Court on the public trust doctrine<sup>241</sup> can be found in *Phillips Petroleum Co. v. Mississippi*, in which the Court reaffirmed the state's ownership of non-navigable tidelands and impressed upon those lands a trust obligation to be exercised on behalf of the public.<sup>242</sup> One of the

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navigation and fishing); *Gibson v. Kelly*, 39 P. 517, 519 (Mont. 1895) (concluding that private title in lands between high and low water marks on navigable streams subject to right of public use); *Prieve v. Wisconsin State Land & Improvement Co.*, 67 N.W. 918, 922 (Wis. 1896) (holding that state's right in navigable lakebed is held in trust for public navigation and fishing; state has no proprietary interest, and cannot abdicate trust in relation to these lands); *People v. Russ*, 64 P. 111, 112 (Cal. 1901) (asserting that right of private landowner to reclaim swampland subject to public right to use of stream for transportation). *But see Appleby v. City of New York*, 271 U.S. 364, 383-84, 399 (1926) (state legislature under state law could grant tidal lands free of public rights by buying title back). For a discussion of these cases, see Huffman, *Myth of Public Rights*, *supra* note 226, at 195-96.

238. For a more detailed parsing of *Illinois Central* than is generally given to the case by public trust scholars, see Huffman, *Myth of Public Rights*, *supra* note 226, at 193-95.

239. *Illinois Central*, 146 U.S. at 453.

240. An earlier, equally strong judicial articulation of the public trust doctrine was set out in *Commonwealth v. Alger*, 7 Mass. (1 Cush.) 53, 84-85 (1851).

241. Although *Phillips* was the last decision to address the doctrine, other cases have raised similar issues. The recent release of the Marshall papers revealed an unpublished dissent by Justice Brennan in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), in which he proposed using public trust to justify the state's exercise of regulatory power:

The California constitution codifies a right whose genesis may be traced back to Roman law; the public's right of access to the sea. The State has adopted a regulatory scheme intended to preserve this longstanding public expectation in the face of increasingly intensive development along the California coast. As a result, no landowner in the coastal zone has any reasonable expectation of a right to use property in such a way as to deny the public access to the ocean.

Justice Brennan, unpublished dissent drafted for *Nollan* 1 (on file with the *Harvard Environmental Law Review*).

242. 484 U.S. 469 (1988). *Phillips* was written by Justice White. Chief Justice Rehnquist and Justices Brennan, Marshall, and Blackmun concurred. The case drew a vigorous dissent from Justices O'Connor, Stevens, and Scalia, principally because this was the first time the court had recognized a state's public trust title to non-navigable water. *Id.* at 485. The dissent also expressed concern for the property expectations of petitioners and thousands of other similarly situated landowners who believed they held valid title. *Id.* at 493.

more significant aspects of the Court's ruling was its adoption of an "ebb and flow" test to expand the application of the public trust doctrine to tidal limits of waterways, and its rejection of the narrower standard of navigability.<sup>243</sup>

Today, the public trust doctrine is "the settled law of this country."<sup>244</sup> Some states have codified the public trust doctrine in their constitutions<sup>245</sup> or in legislation,<sup>246</sup> while others have relied on the courts to develop the doctrine.<sup>247</sup>

The modern public trust doctrine is based on the premise that the sovereign holds certain common properties in trust in perpetuity<sup>248</sup> for the free and unimpeded use of the general public. The

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243. The case potentially extends the public trust doctrine to wetlands adjacent to non-tidal tributaries of tidal rivers as long as there is an ultimate connection to the sea:

Admittedly, there is a difference in degree between the waters in this case, and non-navigable waters on the seashore that are affected by the tide. But there is no difference in kind. For in the end, all tide waters are connected to the sea; the waters in this case, for example, by a navigable tidal river. Perhaps the lands at issue here differ in some ways from tidelands directly adjacent to the sea; nonetheless, they still share those "geographical, chemical and environmental" qualities that make lands beneath tidal waters unique.

*Phillips*, 484 U.S. at 481 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting)). For a discussion of the significance of this language, see Hunter, *Ecological Perspective*, *supra* note 167, at 375.

244. *Illinois Central*, 146 U.S. at 443 (1892). For a discussion of the doctrine's particular importance to western rivers, see Wilkinson, *Headwaters*, *supra* note 203, at 472.

245. See, e.g., CAL. CONST. art. X, § 3 (restricting sale of certain tidelands), § 4 (protecting public access to tidelands and navigable waters), art. I, § 25 (reserving in the people absolute right to fish and restricting sale of state lands along navigable waters). For a more detailed description of California's public trust doctrine, see Ted J. Hannig, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211 (1983).

246. The South Carolina Beachfront Management Act challenged by *Lucas* sought to withdraw the common law property right of private owners up to the high water mark. S.C. CODE ANN. § 48-39-10 (Law. Co-op. 1989) This amounted to an exercise of public trust jurisdiction over those lands.

247. For differing opinions on the wisdom of the judicial activism that has accompanied the growth of the public trust doctrine, compare Lazarus, *Changing Concepts*, *supra* note 115, at 712-13 (arguing that long-term weakness of public trust, which counsels abandonment thereof, is its implicit assumption that the judiciary is in the best position to safeguard environmental concerns) with Wilkinson, *Headwaters*, *supra* note 203, at 466-70 (arguing that judges can be expected to employ old and honored notions of trusteeship in order to fulfill public's interests and expectations). See also Sax, *Public Trust*, *supra* note 202, at 509 (public trust law is a technique by which courts may mend perceived imperfections in legislative and administrative process).

248. The state retains an interest in trust lands even after they are given or sold to private parties, until they are so altered that their value as trust resources is substantially destroyed. *City of Berkeley v. Superior Court*, 606 P.2d 362, 373 (Cal. 1980); *National*

sovereign cannot alienate trust property to the detriment of its citizens,<sup>249</sup> except upon express approval by the legislature,<sup>250</sup> and only upon a legislative finding that the conveyance is in furtherance of the public interest or will not destroy the public's interest in the

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Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 723 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (holding that state has power as administrator of public trust to revoke previously granted rights or enforce trust against lands long thought free of trust); *see also* Atlantic Richfield Co. v. State Lands Comm'n, No. C-663-010 (Super. Ct. Los Angeles County 1990), *cited in* Ralph W. Johnson, *Oil and the Public Trust Doctrine in Washington*, 14 U. PUGER SOUND L. REV. 671, 686 n.93 (1991) (applying doctrine to sustain state denial of permits to locate offshore platforms on tidelands even though permittee held leases on lands); Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 342 (Fla. 1980), *cert. denied sub nom.* Mobil Oil Corp. v. Board of Trustees of Int'l Improvement Trust Fund of Florida, 479 U.S. 1065 (1987) (invoking public trust doctrine to invalidate sovereignty over lands mistakenly conveyed into private ownership during 19th century as swamp and overflowed lands); State v. McIlroy, 595 S.W.2d 659, 664-65 (Ark. 1980), *cert. denied*, 449 U.S. 843 (1980) (holding that freshwater streams are subject to public rights under newly promulgated recreational test of navigability), *cited in* Ausness, *Wild Dunes*, *supra* note 109, at 440 n.25. *But see* Cohen, *Economic Perspective*, *supra* note 202 (communal property rights lying dormant inside some erstwhile private property right waiting for judicial discovery and vindication undercuts secure and predictable rights in property).

249. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *see also* Appleby v. City of New York, 271 U.S. 364 (1926) (compensating private owners for waterfront lots previously granted to them by New York State and subsequently taken by New York City on ground that intent to alienate public trust is clear and in public interest). According to Selvin, *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71 (1877) (holding that state can alienate its title in tidelands but not divest itself of paramount right of public to free navigability around piers) foreshadowed *Illinois Central*. SELVIN, *supra* note 18, at 119-20. *But see* Orion Corp. v. State, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988) (holding that express legislation does not abrogate public trust over tidelands, as state legislature has no authority to sell or abdicate state sovereignty over tidelands, and trust not relinquished by transfer of property); *Galveston v. Menard*, 23 Tex. 349, 351 (1859) (affirming state's authority to alienate not only its title in coastal tidelands but also its regulatory authority over those lands), *cited in* SELVIN, *supra* note 18, at 119.

The extent to which a state can alienate trust resources has been the subject of debate among public trust scholars. *See, e.g.*, Huffman, *Myth of Public Rights*, *supra* note 226, at 192-96 (criticizing public trust cases following *Illinois Central* as ignoring state's ability to alienate trust resources); Harrison C. Dunning, *The Public Trust Doctrine: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516 (1989) (stating that in some states, the public trust doctrine, like the Equal Footing Doctrine, has assumed character of implied constitutional doctrine, immunizing it from legislative abolition).

250. The origins of the legislature's ability to alienate trust lands can probably be traced to Joseph Angell's 1826 book on tidelands, *A TREATISE ON THE RIGHT OF PROPERTY IN THE WATERS AND IN THE SOIL, AND SHORES THEREOF* at 106-07, *cited in* Rose, *Comedy of the Commons*, *supra* note 17, at 735-36. *See also* SELVIN, *supra* note 18, at 36-38. For an extreme instance of the legislature's ability to alienate the public trust, see *Hart v. Burnett*, 15 Cal. 530 (1860) (sustaining the transfer of San Francisco's title to several thousand acres of the downtown area to private owners). According to Selvin, *Hart* was an important first step in the assimilation of the public trust doctrine into Californian and American jurisprudence as an instrument for resource allocation. SELVIN, *supra* note 18, at 172. For a discussion of early cases restricting a state's ability to alienate trust resources, *see id.* at 63-150 (alienation of trust property occurred throughout 19th century to facilitate

remaining resources.<sup>251</sup> The courts strictly scrutinize state alienation of trust property.<sup>252</sup>

Most states hold that the public trust doctrine acts to restrict government actions that adversely affect trust resources,<sup>253</sup> and a few states have held that it imposes an affirmative obligation on states to preserve trust resources for use by the public.<sup>254</sup> The doctrine has been used to provide a basis for states' authority to protect natural resources on privately owned lands and waters<sup>255</sup> and to impose additional affirmative duties on states with respect to those resources.<sup>256</sup> For example, the public trust doctrine has

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economic growth as long as legislatures retained regulatory control over property's use and insured legitimate public access).

251. See *Paepcke v. Public Building Comm'n of Chicago*, 263 N.E.2d 11 (Ill. 1970); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *City of Berkeley v. Superior Court*, 606 P.2d 362, 369 (Cal. 1980), *cert. denied*, 449 U.S. 840 (1980).

252. See, e.g., *Berkeley v. Superior Court*, 606 P.2d at 369 (asserting that statutes abandoning public trust must be strictly construed, intent to abandon must be clearly expressed or necessarily implied, and statute should be given interpretation retaining public's interest in tidelands). It is ironic that the public trust doctrine requires strict scrutiny of state alienation of public interests in trust lands and that the *Lucas* opinion uses strict scrutiny to review state actions that restrict private property rights in the face of public claims.

253. See Lazarus, *Changing Concepts*, *supra* note 115, at 650–55, 650 n.112.

254. See, e.g., *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) (applying public trust doctrine to disallow conveyance of Lake Michigan lakebed to private railroad).

255. See *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132 (S.C. 1950) (holding that any ownership in lands below high water mark is subject to regulatory control of government), *overruled on other grounds sub nom. McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985) (abolishing doctrine of sovereign immunity); see also *Illinois Central*, 146 U.S. at 459 (stating that people hold soil under navigable waters in trust for common use as a portion of their inherent sovereignty, and any legislative act affecting use of trust lands affects public welfare and is within exercise of state's police power). For a highly critical analysis of the use of the public trust doctrine as a source of authorization for state regulatory power, see Huffman, *Public Trust Doctrine*, *supra* note 209, at 556–60 (positing that greatest distortion of historical purposes of public trust doctrine occurs when considering doctrine as source of authority for state regulation).

256. Many articles have been written exploring potential uses of the public trust doctrine to protect important natural resources that might otherwise go unprotected. See, e.g., Daniel G. Kagan, *Private Rights and the Public Trust: Opposing Lakeshore Funnel Development*, 15 ENVTL. AFF. 105 (1987) (preventing overbuilding on lakefront property); Catherine R. Hall, *Dockominiums: In Conflict with the Public Trust Doctrine*, 24 SUFFOLK U. L. REV. 331 (1990) (halting incursion of dockominiums on public trust shoreland); Heather J. Wilson, *The Public Trust Doctrine in Massachusetts Land Law*, 11 ENVTL. AFF., 839 (1984) (protecting Massachusetts' inland areas); Hoff, *Public Beach Access*, *supra* note 187 (strengthening police power analysis of legitimacy of Coastal Commission beach exactions); Anthony R. Chase & Gina M. Lambert, *Remedying CERCLA's Natural Resource Damages Provisions: Incorporation of the Public Trust Doctrine into Natural Resource Damage Actions*, 11 VA. ENVTL. L.J. 353 (1992) (integrating state public trust doctrine into natural resource damage assessment process); Davis, *Environmental Statutes*, *supra* note 232, at 378 (mentioning the public trust doctrine as one of several tools to preserve sufficient streamflow for waste assimilation); Casey Jarman, *The Public Trust Doctrine in*

been used to force a state to identify impacts on public trust waters as part of the planning process<sup>257</sup> and to regulate those waters affirmatively for the benefit of the public's right to use them.<sup>258</sup> The doctrine has been applied to condition a water right held by Los Angeles so that the city would leave sufficient water instream for fish and wildlife.<sup>259</sup> It has provided a basis for sustaining a local ordinance requiring a permit to fill marshlands, stating:

An owner of land has no absolute and unlimited right to change the essential natural character of this land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.<sup>260</sup>

The public trust doctrine, unlike common law nuisance, does not require the courts to balance public and private interests.<sup>261</sup> Once a public trust interest is found in property on behalf of the

*the Exclusive Economic Zone*, 65 OR. L. REV. 1 (1986) (enhancing United States stewardship over resources in EEZ); Michael L. Wolz, Note, *Application of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?*, 6 B.Y.U. J. PUB. L. 475 (1992) (preventing diversion of water flowing into wetlands); Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989) (regulating nonpoint source pollution); Peter A. Fahmy, Note, *The Public Trust Doctrine as a Source of State Reserved Water Rights*, 63 DEN. U. L. REV. 585 (1986) (creating state reserved water rights).

257. See *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976) (stating that the public trust doctrine can be used to prohibit issuance of water appropriation permits for energy production facilities until comprehensive, state-wide water use plan developed).

258. See *Muench v. Public Serv. Comm'n*, 53 N.W.2d 514 (Wis. 1952), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952) (applying public trust doctrine to commit fishing stream to power generation purposes).

259. *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). Note also that the court included language which presaged and preempted the possibility of a takings challenge: "[The public trust] authority . . . bars [any party] from claiming a vested right to divert water once it becomes clear that such diversions harm the interests protected by the public trust." *Id.* at 712.

260. *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) (holding that shoreland zoning ordinance preserves nature, environment, and natural resources as they were created, a state of affairs to which the people have a present right).

261. Courts occasionally require, however, that public trust uses be balanced. See, e.g., *National Audubon Soc'y*, 658 P.2d 709 (requiring that state include explicit balancing test of consumptive and non-consumptive trust uses), *cert. denied*, 464 U.S. 977 (1983); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892); *Superior Public Rights, Inc. v. State Dep't of Natural Resources*, 263 N.W.2d 290 (Mich. Ct. App. 1978) (holding that state should balance water-related trust interests and other interests). See also Davis, *Environmental Statutes*, *supra* note 232, at 381 n.133. For a contrary view which argues that courts are not equipped to engage in the balancing process of public lands decision-making, see Steven M. Jawetz, Comment, *Public Trust Totem in Public Land Law: Ineffective—And Undesirable—Judicial Intervention*, 10 ECOLOGY L.Q. 455, 469–71 (1982).

sovereign, that interest is dominant over any private interests. Therefore, in a state with lands impressed by the common law doctrine of public trust, any clash between public and private interests in those lands will be resolved in favor of the sovereign, extinguishing private rights in those lands.<sup>262</sup>

The public trust doctrine has expanded and metamorphosed in response to changing economic and social conditions as well as to changes in social values.<sup>263</sup> This should not be surprising, as "property law has always been functional, encouraging behavior compatible with contemporary goals of the economy."<sup>264</sup> Thus, modern courts have expanded both the geographic range of the doctrine<sup>265</sup>

262. See, e.g., *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132 (1950), *overruled on other grounds*, *McCall v. Batson*, 329 S.E.2d 741 (1985). See *infra* part III.B.2.c.

263. Several scholars have recommended further expansion of the doctrine to bring it more into synchronization with the basic laws of ecology. See, e.g., Freyfogle, *supra* note 210, at 1289-90 (arguing that number of settings in which legal concept of public trust are applied should be greatly increased); Rieser, *Ecological Preservation*, *supra* note 147 (explaining various theoretical bases for expansion of public trust doctrine to protect naturally functioning systems); Sax, *Understanding Lucas*, *supra* note 142, at 1454 (arguing that property definitions have always been functional and dynamic).

264. Sax, *Understanding Lucas*, *supra* note 142, at 1446-48. See also Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 751 (1990) (discussing need to create new forms of property to respond to emergence of new technological possibilities such as broadcast frequencies, patents, copyrights, and corporate shares).

265. See, e.g., *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972) (public access to and use of dry sand beach); *State of California v. Lyon*, 29 Cal.3d 210 (1981); and *State v. Superior Court of Placer County*, 625 P.2d 256 (Cal. 1981), *cert. denied*, 454 U.S. 865 (1981) (lands between high and low water in non-tidal, navigable lakes and streams); *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (non-navigable tributary of navigable stream); *City of Berkeley v. Superior Court*, 606 P.2d 362 (Cal. 1980), *cert. denied*, 449 U.S. 840 (1980) (privately owned tidelands in San Francisco Bay); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (wetlands); *Robbins v. Dept. of Pub. Works*, 244 N.E.2d 577 (Mass. 1969) (wetlands); *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966) (parkland); *Sierra Club v. Dept. of Interior*, 376 F.Supp. 90 (N.D. Ca. 1974) (parkland); *Montana Coalition for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984) (streambeds); *Warren Sand & Gravel Co. v. Commonwealth, Dep't of Envtl. Resources*, 341 A.2d 556 (Pa. Commw. Ct. 1975) (sand and gravel in streambeds); *Commonwealth v. National Gettysburg Battlefield Tower*, 311 A.2d 588 (Pa. 1973) (historic battlefield); *Wade v. Kramer*, 459 N.E.2d 1025 (Ill. App. Ct. 1984) (wildlife); *Wisconsin's Envtl. Decade, Inc. v. Wisconsin Dep't of Natural Resources*, 340 N.W.2d 722 (Wis. 1983) (downtown area). For a comprehensive list of these and other cases, see Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 ENVTL. L. & LITIG. 107 (1986).

The doctrine, however, is not without limits. See, e.g., *Mamolella v. First Bank*, 423 N.E.2d 204, 206-07 (Ill. App. Ct. 1981) (holding that doctrine does not apply to alley adjoining junk yard); *Hyland v. Borough of Allenhurst*, 372 A.2d 1133, 1136 (N.J. Super. Ct. App. Div. 1977), *modified*, 393 A.2d 579 (N.J. 1978) (holding that doctrine does not apply to man-made showers and bathhouses on seashore); *Evans v. City of Johnstown*, 410 N.Y.S.2d 199 (Sup. Ct. 1978) (holding that doctrine does not apply to pollution from sewage treatment).



and the resources to which it applies, expanding it even into upland areas from its watery base.<sup>266</sup> The list of protected trust interests has also grown to cover recreation, scientific research, and scenic viewing.<sup>267</sup> Preservation of trust resources in their natural state has been held to be an appropriate public purpose protected by the doctrine.<sup>268</sup>

There is growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber the tidelands.<sup>269</sup>

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266. Professor Cohen finds no comfort in arguments based on either analogy or efficiency for the journey of the doctrine from tidelands to rivers and streams, let alone to inland ponds and mountains. See Cohen, *Economic Perspective*, *supra* note 202, at 254–63. But see the following authors, each of whom propounds a theoretical basis for applying the public trust doctrine to those resources: Rose, *Comedy of the Commons*, *supra* note 17; Starr, *Coastal Land*, *supra* note 71; Mary Kyle McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683 (1989); Fred R. Disheroon, *After Lucas: No More Wetlands Takings?*, 17 VT. L. REV. 683 (1993); Michael L. Wolz, Note, *Applications of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?*, 6 B.Y.U. J. PUB. L. 475 (1992) [hereinafter Wolz, *Statutory Gaps*].

267. While the doctrine traditionally applied to navigation, commerce, and fishing, over time the courts have recognized a broader range of public uses of trust resources. See, e.g., *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (recreational, scientific, aesthetic uses); *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514 (Wis. 1952) (recreational uses and enjoyment of scenic beauty); *Diana Shooting Club v. Husting*, 145 N.W. 816 (Wis. 1914) (hunting and fishing over navigable waters); *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893) (sailing, rowing, fowling, bathing, skating, and domestic, agricultural, and city water needs); *Wisconsin's Env'tl. Decade, Inc. v. Dep't of Natural Resources*, 271 N.W.2d 69 (Wis. 1978) (use of pesticides in urban lakes); *Orion Corp. v. Washington*, 747 P.2d 1062, 1073 (Wash. 1987), *cert. denied*, 108 S. Ct. 1996 (1988) (navigation, fishing, swimming, water skiing, and other related recreational purposes); *Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n*, 539 A.2d 760 (N.J. Sup. 1987) (distribution of proceeds from water supply company); *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984) (state decisions implementing hazardous waste law). See also Austin, *Public Trust*, *supra* note 215, at 1009–18 (public interest in trust lands, rather than type of land, should be used to define doctrine's boundaries). For an illuminating discussion on whether recreational uses support a right of public access to waterways and their shores under the public trust doctrine, see Rose, *Comedy of the Commons*, *supra* note 17, at 753–58.

268. See *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). See also *State of Cal. v. Fogerty*, 29 Cal. 3d 240, 247 (1981) (holding that areas of shorezone protected by public trust for recreational and ecological purposes subject to overuse can be closed to public bathing); *State of Cal. v. Lyon*, 29 Cal. 3d 210, 216 (1981) (concluding that fast-disappearing resource of great importance for ecology and recreational needs of state's residents was protected by public trust doctrine).

269. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971).

The public trust doctrine should qualify as a background principle of property law in the many jurisdictions in which it has long been used for a variety of environmentally protective purposes. The controversiality of both the doctrines of public trust and custom could, however, preclude their application to wetlands and barrier beaches unless their doctrinal underpinnings in those areas are sufficiently strong to withstand constitutional scrutiny.

*b. A Solid Doctrinal Foundation Exists for Applying Custom and Public Trust to Wetlands and Barrier Beaches*

Looking at coastal and wetland resources through a common law lens, one can see how their destruction creates a public, and in some cases, a private nuisance. The harms that ensue—flooding, loss of water supply for drinking, agricultural, or industrial purposes, and loss of livelihood through destruction of species—are classic nuisance injuries<sup>270</sup> which can be avoided by preventing the destructive activity.<sup>271</sup> Government regulation aimed at protecting these resources should therefore be able to rely on the common law of nuisance. Judicial precedent abounds; common law doctrine is on sound footing.

Despite the characteristics and use of these lands,<sup>272</sup> controversy surrounds the applicability of the custom and public trust doctrines to barrier beaches and wetlands. Although the doctrines

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270. See *supra* part III.A.

271. But see Humbach, *Nuisance*, *supra* note 9, at 10–11 (starting assumption of nuisance—that detrimental uses of land may not be socially intolerable or blameworthy—through balancing process will allow detrimental uses).

272. Barrier beaches and wetlands areas are classic public trust resources. They are essential for fish spawning as well as for shellfish beds, boating, timbering, oil and gas production, and recreation, to name just a few traditional public trust purposes. Other uses of these resources, such as freshwater supply, birdwatching, photography, hiking, and scientific study have also been recognized as protected public trust uses. See *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (acknowledging growing public recognition that one of the most important uses of tidelands is preservation in their natural state to accommodate scientific study and to provide habitats for birds and marine life). Wetlands provide commercially valuable products such as fish, shellfish, rice, and cranberries as well as opportunities of commercial value, such as recreation. See *supra* note 131. The fact that wetlands control erosion and sedimentation makes them essential to navigation as well. *Id.* See also EDWIN H. CLARK II ET AL., *THE CONSERVATION FOUNDATION, ERODING SOILS: THE OFF-FARM IMPACTS* 82–84 (1985) (sedimentation occurring in harbors, bays, and navigation channels reduces capacity of these facilities to handle commercial and recreational crafts, increases likelihood of shipping accidents, and requires expensive dredging to keep facilities usable).

have successfully been applied to the former, no cases or articles could be found extending the doctrine of custom to wetlands.<sup>273</sup> Neither custom nor the public trust doctrine was considered part of the historic public trust, which focused narrowly on navigable waters.<sup>274</sup> The fact that state courts have redrawn the boundaries of the public trust doctrine with abandon, even leaving the doctrine's watery base entirely,<sup>275</sup> does not eliminate the need for caution. The controversy surrounding the use of these doctrines may make any further expansion of them suspect.<sup>276</sup> Unless a firm doctrinal foundation can be placed under the application of these doctrines to

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Wetlands and barrier beaches are also classic trust locales. See *supra* part III.B.2.a. The fact that wetlands are often non-navigable is irrelevant for determining the public trust doctrine's applicability to them. American courts have long abandoned the requirement that public trust resources be navigable. *Phillips Petroleum Co. v. State of Mississippi*, 484 U.S. 469 (1988). As one scholar has opined on the issue of navigability, "the whole concept of navigability for determining anything other than the floating of a supreme court opinion should be abandoned." Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C. DAVIS L. REV. 233, 250 n.66 (1980) (paraphrasing Professor Charles E. Corker of the University of Washington). For a thorough discussion of the application of the public trust doctrine to wetlands and the relevance of navigability, see Wolz, *Statutory Gaps*, *supra* note 266, at 485-87.

As noted elsewhere in this Article, the doctrine of custom has long applied to barrier beaches. *Supra* part III.B.1. Recently, the public trust doctrine has been applied in one jurisdiction to dry sand beaches as well. See *Neptune City v. Avon-By-the-Sea*, 294 A.2d 47 (N.J. 1972).

273. Although several articles have been written on the applicability of the public trust doctrine to coastal and wetland resources, they are not entirely in agreement on how that is to be accomplished. See, e.g., Fred R. Disheroon, *After Lucas: No More Wetland Takings?*, 17 VT. L. REV. 683 (1993) (arguing that doctrines of navigational servitude and public trust defeat claims of private ownership in wetlands); Mary K. McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683 (1989) (positing that public trust doctrine applies to wetlands whether navigable or not); Wolz, *Statutory Gaps*, *supra* note 266 (stating that public trust doctrine could be used to protect water resources on which wetlands depend, wildlife dependent on wetlands for continued vitality, or wetland itself). For a discussion of the application of both the public trust doctrine and custom to beaches, see Starr, *Coastal Land*, *supra* note 71.

274. See *supra* part III.B.2.a.

275. Reed, *supra* note 265, at 116-17. See Lazarus, *Changing Concepts*, *supra* note 115, at 649 (doctrine has steadily emerged from watery depths to embrace variety of upland areas and resources); *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.*, 225 A.2d 130 (N.J. 1966) (holding that gas pipeline company was barred from condemning land devoted to conservation and preservation of wildlife because land devoted to prior public use); *Olmstead v. City of San Diego*, 124 Cal. App. 14 (Cal. Dist. Ct. App. 1932) (finding that road would seriously interfere with park use); *Parsons v. Walker*, 328 N.E.2d 920, 925 (Ill. App. 1975) (stating that public trust attaches to land conveyed to University of Illinois "as a forest, wild and plant-life reserve, as an example of landscape gardening and as a public park"). For an interesting discussion about the use of the concept of sovereign ownership in trust as a legal basis for economic expansion, as opposed to natural resource protection, see Lazarus, *Changing Concepts*, *supra* note 115, at 640-41.

276. For a particularly ascerbic view of the public trust doctrine, see Cohen, *Economic Perspective*, *supra* note 202, at 276:

coastal and wetland resources, their expanded use to reach these areas may not survive constitutional scrutiny when confronted with a countervailing constitutional right. Professor Rose's analysis of the historical underpinnings of custom and public trust provides a good starting point for the search for that foundation.<sup>277</sup>

Professor Rose explores the doctrinal foundations of both custom and public trust to understand why they have survived in an era dominated by the concept of private property. In both doctrines she finds an implicit "longstanding notion" that certain kinds of property ought to be exempt from the classical economic presumption of exclusive owner control.<sup>278</sup> Such property can be owned collectively and managed by society at large with the public's claims independent of and superior to any purported claims by private landowners or governmental managers. She calls this property "inherently public property."<sup>279</sup>

Professor Rose has identified commerce as the central object of early inherently public property doctrines (such as custom and public trust).<sup>280</sup> "Inherently public property," the object of those ancient doctrines, held out the possibility of infinite "returns to scale,"<sup>281</sup> making the property extremely valuable to eighteenth- and nineteenth-century England.<sup>282</sup> But scale returns, or the capac-

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The resurrection and transformation of the ancient English public trust doctrine into a device to abrogate private property rights is a piece of disingenuous gimmickry which does its champions no honor. The public trust doctrine has been retrieved from the grave, and like some vampire, transformed into an obscure and pernicious force that it was not in life. It, and we, would best be served by reinterring it following a stake to the heart.

For other articles critical of any extension of the two doctrines, see Huffman, *Myth of Public Rights*, *supra* note 226 (arguing against mythology of public trust doctrine); Lazarus, *Changing Concepts*, *supra* note 115, at 633 (arguing against expansion of doctrine because it interferes with important process of reworking natural resources law and provokes clash between private property protection and natural resource preservation goals).

277. See Rose, *Comedy of the Commons*, *supra* note 17.

278. *Id.* at 713.

279. *Id.* at 720.

280. *Id.* at 774.

281. Increasing returns to scale, a 19th-century concept used to identify natural monopolies subject to government ownership or public trust regulation, exist where greater production can lead to proportionately lower costs per item. According to Professor Rose, analogies to scale returns can be found in the doctrines of inherently public property (i.e., property subject to prescription, public trust authority, or custom), "felicitously expressed in the phrase, 'the more the merrier.'" Rose, *Comedy of the Commons*, *supra* note 17, at 767-71. A modern example of scale returns is the telephone, where the telephone's value to the individual increases the more users of the system there are.

282. *Id.* at 766-74.

ity to expand wealth, was not the only feature of commerce in that era. According to Rose, commerce had educative and socializing virtues as well. She calls this "doux commerce."<sup>283</sup>

The twentieth-century equivalent of "doux commerce," Rose writes,<sup>284</sup> is recreation and properties devoted to recreational uses. The highest value of these lands is achieved when preserved for the public at large.<sup>285</sup> The continuing vitality of common law doctrines, like custom and public trust, has as much to do with the protection of physical locations where recreational activities can take place, as with commerce or any historical provenance.

For the doctrinal foundations of public trust and custom to be applicable to wetlands and barrier beaches, these lands must be perceived as "inherently public property."<sup>286</sup> According to Professor Rose, in order to qualify, (1) the land must be physically capable of monopolization by private persons, and (2) the public's claim to the property must be superior to that of the private owner, because the properties are most valuable when left in their natural state to benefit an indefinite and unlimited numbers of persons.<sup>287</sup> Wetlands and barrier beaches would appear to meet both of these criteria. The pressures on these fast-dwindling resources make them uniquely susceptible to monopolization by private landowners.<sup>288</sup> And, as shown *infra*, their contribution to commerce, both "doux" and mercantile, makes the public's claim to them superior to that of private landowners.

Pressures on coastal and wetland resources have caused them to decline significantly in both quantity and quality. Coastal barrier beaches have fallen to residential, industrial, and agricultural de-

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283. Rose, *Comedy of the Commons*, *supra* note 17, at 775.

284. *Id.* at 779.

285. Professor Rieser advances Professor Rose's analysis by finding analogies to "doux commerce" in ecological preservation. See Rieser, *Ecological Preservation*, *supra* note 147, at 402-03.

286. Rose, *Comedy of the Commons*, *supra* note 17, at 720.

287. See Rose, *Comedy of the Commons*, *supra* note 17, at 774 (arguing that property's "publicness" created the "rent" of the property, and public property doctrines (like public trust and custom) protected that publicly created rent from capture through private holdout).

288. See, e.g., *Van Ness v. Borough of Deal*, 393 A.2d 571, 574 (N.J. 1978) (finding that state was rapidly approaching crisis as to availability to public of its priceless beach areas); *Borough of Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 53 (N.J. 1972) (discussing how remaining tidal water resources in state ownership are growing very scarce because of increased population, while industrial development and recreational demands increase their importance to public welfare).

velopment, freshwater demand, and pollution.<sup>289</sup> Wetlands have succumbed to ports and marinas, mining, farming, and urban, residential, and industrial development.<sup>290</sup> In the United States, coastal population has risen by 40 million people since 1960.<sup>291</sup> Over half of the United States population now lives within fifty miles of the shoreline, and the shoreline population continues to grow at four times the national average growth rate.<sup>292</sup> Wetlands and barrier beaches are becoming increasingly scarce, and thus vulnerable to private monopolization or "hold up" by individual landowners.<sup>293</sup> Furthermore, this process of development is devastating to barrier beaches and wetlands because both of these resources are most valuable to the public when left in their natural state.

Professor Rose finds in the educational and socializing values of "doux commerce" perhaps the greatest "returns to scale" protected by traditional property doctrines,<sup>294</sup> and finds in recreation a modern day surrogate to "doux commerce," the social glue that holds twentieth-century America together.<sup>295</sup> Both beaches and wetlands offer important public recreational opportunities which they share with "doux commerce" and offer important educational and socializing effects that permit us to get along better with each other and teach us social responsibility.<sup>296</sup>

289. See generally *STEMMING THE TIDE*, *supra* note 133. See also NATIONAL OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, 50 YEARS OF POPULATION CHANGE ALONG THE NATION'S COASTS 1960-2010 (Apr. 1990) (predicting coastal population will grow from 110 million to more than 127 million by 2010).

290. For information on wetland losses, see OFFICE OF TECHNOLOGY ASSESSMENT, *WETLANDS: THEIR USE AND REGULATION* (1984); W. FRAYER, T. MONAHAN, D. BOWDEN, & F. GRAYBILL, U.S. DEP'T OF THE INTERIOR, *STATUS AND TRENDS OF WETLANDS AND DEEPWATER HABITATS IN THE COTERMINOUS UNITED STATES 1950's TO 1970's* (1983); *STEMMING THE TIDE*, *supra* note 133.

291. *STEMMING THE TIDE*, *supra* note 133, at 5.

292. See *STEMMING THE TIDE*, *supra* note 133.

293. Over a period of 200 years, it is estimated that the lower 48 states lost an estimated 53% of their original wetlands and that, on average, over 60 acres of wetlands were lost every hour during that period. THOMAS E. DAHL, U.S. DEP'T OF THE INTERIOR, *WETLANDS LOSSES IN THE UNITED STATES 1780's TO 1980's* 1, 4 (1990). Barrier beaches were disappearing at a rate of 6000 acres per year by the 1980s. NATIONAL WILDLIFE FEDERATION, *BULWARKS OF SAND . . . OUR VANISHING BARRIER ISLANDS* (1980), *quoted in* BETH MILLEMANN, *AND TWO IF BY SEA: FIGHTING THE ATTACK ON AMERICA'S COASTS* 12 (1986).

294. See Rose, *Comedy of the Commons*, *supra* note 17, at 775-77.

295. Rose therefore concludes there is nothing surprising in the movement from commerce to recreation as the major reason to support the "publicness" of certain property and as a rationale for the use of both custom and public trust. *Id.* at 779-80.

296. In 1991, approximately 35 million recreational anglers fished for wetland-dependent freshwater, saltwater and shellfish species, 18 million Americans hunted migratory

Barrier beaches and wetlands thus appear to share many of the features of inherently public property described by Rose. They are susceptible to private holdout and promote both the mercantile interests of commerce as well as its softer, socializing functions. This makes the public's claim to them far superior to that of any individual landowner. The doctrines of custom and public trust, which preserve the public's claim to these lands in their natural state, therefore properly apply to both types of property and have solid doctrinal support.

The discussion up to this point has shown how both custom and public trust are background principles of property law that form the basis of our understandings about the bundle of rights which make up title to private property. Both doctrines have been used to protect public access to, as well as uses of, certain natural areas.<sup>297</sup> Although of ancient, and—according to some—suspect origin, both doctrines have displayed astonishing endurance, and, in the case of public trust, amazing flexibility and vitality.

The doctrines of custom and public trust are being used in the context of this Article merely to provide background principles of common law to support regulatory initiatives protecting wetlands and barrier beaches. Even in such a supplementary or corollary role they may, however, generate controversy. This is particularly likely to be true when the doctrines clash with countervailing property rights, as in claims under the Just Compensation Clause of the Fifth Amendment. Yet this clash is exactly what may happen if government regulatory and private litigants rely upon these common law doctrines to defend against takings claims by private landowners now that *Lucas* has revived common law property doctrines.

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and other waterfowl as well as big and small game associated with wetlands, and 30 million of us listed wildlife observation among our recreational pursuits. NATIONAL AUDUBON SOCIETY, VALUING WETLANDS: THE COST OF DESTROYING AMERICA'S WETLANDS 5-11 (Deanne Kloepper ed., 1994).

Professor Rieser, in her search for a new theoretical basis for the public trust doctrine, argues that the ecological integrity of natural resources serves as a modern day surrogate for 18th- and 19th-century theories of commerce. See Rieser, *Ecological Preservation*, *supra* note 147.

297. One criticism of the doctrines is that they protect only marginally useful resources. Another is that the doctrines are reactive, not proactive, and must await some attempt to convert areas protected by the doctrines before they are invoked. As to the marginality of the resources, see *supra* notes 131-133. At least one Justice believes that the doctrines have prospective force as well. See Justice Brennan's unpublished dissent in *Nollan v. Cal. Coastal Comm'n*, *supra* note 241.

*c. The Intersection of Common Law Property Doctrines and the Takings Clause*<sup>298</sup>

The relationship between the public trust doctrine and takings jurisprudence has been largely unexplored by the courts.<sup>299</sup> Few courts have adjudicated the issue of whether application of the doctrine will provide a complete defense to a takings claim or, conversely, whether a state can effect a taking of private property when, acting under authority of the public trust doctrine,<sup>300</sup> it limits the use of that property in some way.<sup>301</sup> While there has been only

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298. This question is discussed here only in the context of the public trust doctrine. While several courts have found that custom is a complete bar to a takings claim, *see, e.g.,* *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) (city's denial of permit to build seawall on oceanfront property does not effect a taking in the face of a claim based on custom); *Arrington v. Mattox*, 767 S.W.2d 957 (Tex. Ct. App. 1989), *cert. denied*, 493 U.S. 1073 (1990) (holding public easements acquired by custom do not effect a taking), scholarship to date has raised the issue only in the setting of the public trust doctrine. Given that both custom and public trust transfer private property into public hands and create a pre-existing right in the public in those lands, the conclusions reached in this section with respect to the public trust doctrine should be applicable to custom as well.

299. The *Lucas* Court could have avoided the spectral presence of the public trust doctrine and custom if it had followed more recent takings precedent and retained an expectational or functional definition of property. Instead, the Court incorporated into its view of property definitional or historic property concepts like public trust and custom. *See Sax, Western Water*, *supra* note 86, at 944.

300. Several courts have found that custom is a complete bar to a takings claim. *See supra* note 298.

301. Such questions have entertained public trust scholars for decades, causing considerable concern for some:

[T]he [public] trust doctrine threatens to fuel a developing clash in liberal ideology between furthering individual rights of security and dignity, bound up in notions of private property protection, and supporting environmental protection and resource preservation goals, inevitably dependent on intrusive governmental programs designed to achieve longer-term collectivist goals.

Lazarus, *Changing Concepts*, *supra* note 115, at 633. *See also* Huffman, *Myth of Public Rights*, *supra* note 226 (arguing that public interest is better served by adhering to clear purposes of the Fifth Amendment than by avoiding amendment's requirements through mythology of modern doctrine); Huffman, *Public Trust Doctrine*, *supra* note 209, at 568-72 (stating that modern doctrine is inconsistent with values of constitutional democracy). *But see* Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983), (concluding that the doctrine's development results in the redefinition of property rights to the disadvantage of property owners) [hereinafter Sax, *Decline*]; Sarah E. Wilson, *Private Property and the Public Trust: A Theory for Preserving the Coastal Zone*, 4 UCLA J. ENVTL. L. & POL'Y 57 (1984) (arguing that the concept provides an innovative basis for assertion of public rights to sustain protective environmental regulations); Rieser, *Public Trust*, *supra* note 27 (proposing a new way of analyzing just compensation clause challenges to governmental actions aimed at vindicating public rights in waters and tidally influenced lands); Johanna Searle, Note, *Private Property Rights Yield*



one instance in which an apparent assertion of public trust authority has been declared unconstitutional,<sup>302</sup> an exercise of public trust authority by a state should not be considered insulated from such challenges.<sup>303</sup> Since *Lucas* may invite the use of public trust as a defense to a takings claim,<sup>304</sup> one can foresee a clash between these two "competing, dynamic principles of American property law."<sup>305</sup>

Courts have commonly given several reasons why exercises of public trust authority should bar a takings claim and should not be considered a taking. One reason is that because the state cannot alienate trust property in favor of private interests,<sup>306</sup> private interests must be considered subservient to the dominant public interest in those lands.<sup>307</sup> Conveyance of trust land to private parties, there-

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to the *Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897, 910-17 (1990) (discussing clash between public and private property rights as courts attempt to carve judicial solutions to environmental problems).

302. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (striking down Maine's intertidal law granting a public general recreational easement where recreational uses did not exist prior to the enactment of Colonial Ordinance 1641-47 of the Massachusetts Bay Colony and were not developed as common law right after statehood). See Rieser, *Public Trust*, *supra* note 27, at 6-7. See also Huffman, *Public Trust Doctrine*, *supra* note 209, at 568.

303. See Spalding, *Pearl*, *supra* note 202, at 43-45 (1989) (stating that a takings challenge will not likely survive in the face of state case law showing state's claim to tidelands or any other property or resources is protected by the public trust doctrine).

304. The wisdom of relying on judicial activism to advance a political agenda may not necessarily be good for the environment. Berlin, *Just Compensation*, *supra* note 13, at 147-50 (arguing that constitutional history indicates that attempts to use the courts to block progressive social legislation are probably ultimately doomed to failure and can lead to debilitating complacency). Moreover, the success of these efforts will depend on the robustness of the doctrine in the given jurisdiction and the willingness of the state court to defy the clear message of the U.S. Supreme Court in *Lucas* to chill regulations that have as their central goal preserving land in its natural state. See Sax, *Understanding Lucas*, *supra* note 142, at 1437-38.

305. Rieser, *Public Trust*, *supra* note 27, at 5.

306. Several courts have held that conveyance of public trust lands to private trust parties remains subject to the public rights in the property conveyed. See, e.g., *San Diego County Archaeological Soc'y, Inc. v. Compadres*, 81 Cal. App. 3d 923 (1978) (holding that a lagoon remained subject to public trust easement claimed by city and state based on Mexican grants), *rev'd on other grounds sub nom. Summa Corp. v. California*, 466 U.S. 198 (1984) (holding that state's claim to servitude must have been presented in federal patent proceeding to survive); see also *Boston Waterfront Development Corp. v. Commonwealth*, 393 N.E.2d 356 (Mass. 1979) (holding that title to wharf and granite building constructed over filled tidelands is subject to public trust obligation that land be used for public purpose); *Orion Corp. v. State*, 747 P.2d 1062, 1072 (Wash. 1987) (finding that privately owned tidelands are subject to public trust).

307. See, e.g., *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987) (holding that public trust doctrine precluded takings claim because title to trust resources was acquired subject to whatever state action was necessary to protect public's interest in trust resources).

fore, remains subject to the over-riding public rights in that property.<sup>308</sup>

The land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development.<sup>309</sup>

To allow the private owner to displace the dominant state interest by a takings claim would be the same as saying that the state cannot protect its interest in those lands.

Another reason commonly given is that since private rights attached to the trust resources later than the public's rights, which originated with (or even prior to) sovereignty, private title does not include the right to affect trust resources adversely.<sup>310</sup> Thus, the landowner has no title in that land in the first place.<sup>311</sup>

Because a landowner cannot claim a property right she never possessed<sup>312</sup> or, alternatively, has one that can be rescinded by the

308. See *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 123 (D. Mass. 1981) (finding that no developed western civilization has recognized absolute rights of private ownership in public trust land below low water mark as a means of allocating scarce and precious resources among the competing public demands).

309. *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 367 (Mass. 1979).

310. See *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (holding no private vested rights to affect trust resources adversely); see also *United States Trust Co. v. New Jersey*, 431 U.S. 1, 50 (1977) (Brennan, J., dissenting); *Warren Sand & Gravel Co., Inc. v. Commonwealth Dep't of Envtl. Resources*, 341 A.2d 556, 560 (Pa. Commw. 1975). Conveyances of trust resources to private parties remain impressed with public trust, *People v. California Fish Co.*, 138 P. 79, 84 (Cal. 1913) and *State v. Superior Court*, 625 P.2d 239, 250 (Cal. 1981), *cert. denied*, 454 U.S. 865 (1981), and remain subject to the sovereign's retained supervisory authority. See, e.g., *1.58 Acres of Land*, 523 F. Supp. at 124; *Bortz Coal Co. v. Commonwealth*, 279 A.2d 388, 396 (Pa. 1971), *cited in Lazarus, Changing Concepts*, *supra* note 115, at 655 nn.158-60.

Some commentators suggest that this line of thinking can also be seen in cases involving submerged lands, in which the courts consistently hold that public rights in trust resources pre-exist any private property rights in those lands. See Spalding, *Pearl*, *supra* note 202, at 45; Rieser, *Public Trust*, *supra* note 27, at 38-41. See also Davis, *Environmental Statutes*, *supra* note 232, at 384-85 (public trust and takings implications of Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (1986), *cert. denied* 479 U.S. 1053 (1987), *aff'g in part* 8 Ct. Cl. 160 (1985)).

311. The most the landowner has is the equivalent of an easement or usufructuary interest in the land. Fee title to trust land must remain in the sovereign, since the sovereign could not divest itself of this interest in the landowner's favor absent a specific legislative directive to the contrary. See *supra* part III.B.2.a.

312. Compare *Keystone Bituminous Coal v. DeBenedictus*, 480 U.S. 470, 491 n.20

sovereign at any time, the Fifth Amendment provides no shelter from state action affecting public trust property. It is as though the private property owner of trust lands is merely a custodian of those lands for present and future generations,<sup>313</sup> and the state has an easement over her lands that permanently burdens ownership of them.<sup>314</sup>

Any construct that removes exercises of sovereign authority from constitutional review has been (and should be) met with skepticism and concern.<sup>315</sup>

[A] constitutional democracy is a limited democracy, and it is the courts' role to be vigilant in imposing those limits. Among those limits is the fifth amendment's protection of property rights, a protection of little value if the courts are free to convert clearly defined easements into vast public rights.<sup>316</sup>

This concern may find expression in judicial dogma favoring the private landowner and rejecting common law doctrine in favor of a constitutional right.<sup>317</sup> The likelihood of this may increase as the doctrine moves further from its perceived historic roots.<sup>318</sup>

(deciding that since no individual had the right to use her property to create a nuisance, state was not "taking" anything when it asserted its power to enjoin nuisance-like activity).

313. Professor Sax suggests a usufructuary model of property rights as an analogue for this conclusion. Under this model, private landowners only have the right to use land in ways compatible with the community's dependence on the property as a resource. See Sax, *Understanding Lucas*, *supra* note 142, at 1452. See also Rose, *Environmental Ethics*, *supra* note 11, at 31 (arguing that concepts of property, especially common property, are used to derive norms of responsibility and carefulness about shared trust); see also Carol Kamm, Note, *Public Trust, Farmland Protection, and the Connecticut Environmental Protection Act: Red Hill Coalition, Inc. v. Town Plan and Zoning Comm'n*, 23 CONN. L. REV. 811, 823 (1991) (including supporting citations); Austin, *Public Trust*, *supra* note 215, at 1005; *Forestier v. Johnson*, 127 P. 156, 160 (Cal. 1912).

314. Under this view, there can only be a consensual transfer of property to the government because under both custom and public trust the land is no longer in private ownership. See Rose, *Comedy of the Commons*, *supra* note 17, at 716.

315. See Lazarus, *Changing Concepts*, *supra* note 115, at 705 (arguing that liberal thought, particularly concern for private autonomy and security, was main impetus behind framers' inclusion of Just Compensation Clause in Fifth Amendment), 702-06. See also Huffman, *Public Trust Doctrine*, *supra* note 209, at 569-70 (discussing public trust doctrine as means of evading fundamental values of Constitution).

316. Huffman, *Public Trust Doctrine*, *supra* note 209, at 534 (footnotes omitted).

317. See, e.g., *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 367 (Mass. 1979) (stating that public trust concept, with its implication of unbridled sovereignty, is "difficult to describe in language in complete harmony with the language of the law ordinarily applied to privately owned property").

318. See *Bott v. Comm'n of Natural Resources*, 327 N.W.2d 838, 850-51 n.43 (Mich. 1983) (requiring state to compensate private parties in order to extend public access

Reliance on these doctrines by government regulators to defend against takings claims may also destabilize expectations about property. To the extent property ownership plays an important role in promoting individual liberty, providing for political stability, and encouraging economic prosperity,<sup>319</sup> any doctrine that threatens the stability of a regimen of private property could be challenged.<sup>320</sup> Frustrating the expectations of landowners could lead to a backlash not only against the doctrines, but also against the environmental laws which protect wetlands<sup>321</sup> and barrier beaches.

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to all recreational waters); *Zinn v. State*, 334 N.W.2d 67, 71-72 (Wis. 1983) (requiring compensation to private parties for extension of public trust beyond existing level of lake). *See also In re Opinion of the Justices*, 313 N.E.2d 561, 568 (Mass. 1974) (finding that legislation authorizing public access to private beaches takes private property, thereby requiring compensation), *cited in Lazarus, Changing Concepts, supra* note 115, at 649 n.96.

319. One of the chief advocates of this view of property is Richard Epstein. *See generally* Epstein, *Property*, *supra* note 3 (arguing that property should be regarded as fundamental civil right because of its universality and utility, enabling resources to reach their highest and best use with minimum of friction).

320. For a contrary view, see J. Peter Byrne, *Green Property*, 7 CONST. COMMENTARY 239 (1990) (arguing for transformation of property law to achieve environmentally sustainable land use program).

321. Wetlands regulatory programs are a favorite target of property rights advocates because they so clearly implicate questions of private rights, public values and fairness. A takings claim has been raised in more than one-half of the approximately 400 wetlands regulatory cases decided in the past 30 years. Jon Kusler & Erik J. Meyers, *Takings: Is the Claims Court All Wet?*, NAT'L WETLANDS NEWS (Env'tl. L. Inst.), Nov./Dec. 1990, at 6. In spite of this assault, in the past 10 years, only four wetlands cases could be found in which a court ordered the state to compensate a landowner. *See* 1902 Atlantic Ltd. v. Hudson, 574 F.Supp. 1381 (E.D. Va. 1983) (denying permit to fill 11 acres deprived owner of all economically viable use of her land); *Florida Rock Indus. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (declaring 95% reduction in property value a taking); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (denying permit for 12.5 acres of 250-acre site entitled property owner to \$2.65 million because private interest in developing wetlands greater than state's interest in preserving it for wildlife habitat), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994); *Formanek v. United States*, 26 Cl. Ct. 332 (1992) (denying permit to fill 99 acres of wetlands on 111-acre site deprived owner of "highest and best use" of property entitling claimant to \$933,921). *But see* *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334 (1992), *aff'd* 10 F.3d 796 (Fed. Cir. 1993) (holding owner's losses insufficient because they amounted to no more than a diminution of value); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991) (finding 25% reduction in property value not a taking because land's remaining value exceeded owner's economic investment); *Bowles v. United States*, 23 Cl. Ct. 443 (1991) (finding no taking because owner not deprived of any economically viable use of land); *Dufau v. United States*, 22 Cl. Ct. 156 (1990) (finding 16-month permit processing delay not temporary taking when action substantially advances legitimate state interest); *Cloutier v. United States*, 19 Cl. Ct. 326 (1990) (finding construction of 23-foot wall next to existing 13-foot flood wall not compensable taking); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (denying permit to fill 10,000 acres of wetlands not taking because 80% of site still available for development); *Jentgen v. United States*, 657 F.2d 1210 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982) (denying permit to fill 80

#### IV. INFUSING PUBLIC TRUST AND CUSTOM INTO TAKINGS JURISPRUDENCE SHOULD NOT DESTABILIZE EXPECTATIONS

Under the new rule in *Lucas*, the existence of a common law footing for a proscriptive regulation eliminates the constitutional need to compensate owners of regulated property. It has been argued elsewhere in this Article that the common law doctrines of custom and public trust provide such a footing. By injecting these two common law doctrines into takings jurisprudence, *Lucas* sets up a conflict between private and public expectational interests in certain kinds of property. Unless these doctrines accord with commonly held public understandings about property, the conflict could have a destabilizing effect on the expectations of landowners.<sup>322</sup>

A central function of the law of property<sup>323</sup> is protection of the prospective landowner's reasonable expectations<sup>324</sup> about the ability

acres of 101.8-acre site where Corps offered to modify permit to fill 20 acres not taking even though landowner suffered diminution in economic value and frustration of reasonable expectations). Until the recent decision in *Loveladies Harbour, Inc. v. United States*, 28 F.3d 1171, 1180-82 (Fed. Cir. 1994) (finding proper denominator is acreage affected by permit denial), taking claims had been withstood upon a showing of reasonable remaining use of the property. *See, e.g., Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334 (1992), *aff'd* 10 F.3d 796 (Fed. Cir. 1993).

322. South Carolina is one state where there simply should have been no question about the applicability of the public trust doctrine to barrier beaches had the State Coastal Council been given an opportunity to raise the doctrine on remand. *See State v. Pinckney*, 22 S.C. 484 (1884) (using doctrine to quiet title to tidelands); *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*, 146 S.E. 434, 436 (1928) (holding as trust for public purposes title to land below high water mark on tidal, navigable streams under well-settled rule in state); *Heyward v. Farmers Co.*, 19 S.E. 963 (S.C. 1894) (holding that state cannot convey trust lands); *State v. Fain*, 259 S.E.2d 606, 608 (S.C. 1979) (finding that title to land between high and low water marks remains in state for public's benefit); *Hobonny Club, Inc. v. McEachern*, 252 S.E.2d 133, 135 (S.C. 1979) (determining that tidelands enjoy special status of being held in trust for public purposes); *State v. South Carolina Coastal Council*, 346 S.E.2d 716, 719 (S.C. 1986) (finding that issuing permit to enclose estuarine marsh violates public trust). *See also* Johanna Searle, Note, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C.L. REV. 897 (1990). *See* Att'y Gen. Opin., 1975 S.C. AG LEXIS 1142 (September 30, 1975) for a recitation of the provisions of the state's 1885 constitution establishing the public trust over barrier beaches and tidelands. With regard to the application of the public trust doctrine to the State's freshwater wetlands, *see Carter v. South Carolina Coastal Council*, 314 S.E.2d 327 (S.C. 1984) (citing *Just v. Marinette County*, 1201 N.W.2d 761 (Wis. 1972), with approval).

323. Nuisance law is also premised on the reasonable expectation of the quiet enjoyment of property. *See Copart Indus. v. Consol. Edison Co.*, 362 N.E.2d 968 (N.Y. 1977), *quoted in State v. Schenectady Chem., Inc.*, 459 N.Y.S.2d 971, 976 (N.Y. Sup. Ct. 1983), *modified* 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984).

324. The majority's use of "existing rules or understandings" as a basis for defining the spectrum of uses that qualify for protection under the Constitution acts as an analogue

to acquire, use, and transfer property.<sup>325</sup> The doctrines of custom and public trust would appear to be at odds with this function because of their potential, when creatively interpreted, to transfer title unexpectedly from private to public hands, and thus destabilize expectations.<sup>326</sup>

The public trust doctrine helps to harmonize the laws of nature and the law of property,<sup>327</sup> bringing the expectations of landowners into harmony with the needs of nature by infusing an ecological perspective into property law.<sup>328</sup> This is beneficial because the laws of nature are fundamental and irrefutable, unlike the laws of property, which can be changed by legislative or executive fiat.<sup>329</sup>

The laws of nature teach us that private property boundaries have no relationship to the outer edges of an ecological system like a wetland or a migrating barrier beach.<sup>330</sup> The failure of current

for those expectations. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

325. See Epstein, *Property*, *supra* note 3. See also Epstein, *Seven Deadly Sins*, *supra* note 7, at 976 (arguing that permanence, stability and certainty are virtues of property rights system); Joseph L. Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980) (stating that central idea of public trust doctrine is preventing the destabilizing disappointment of expectations held in common without formal recognition such as title) [hereinafter Sax, *Historical Shackles*].

326. The potential to destabilize expectations might be greater with public trust than with custom. A customary practice by its very nature puts the landowner on notice of the public's use of her land. Custom recognizes only long-standing, continuous practices by localities, and such use must be reasonable. See, e.g., *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994) (holding use of dry sand areas by public so notorious as to create constructive notice that use is not part of bundle of rights acquired by purchaser). But see Hoff, *Public Beach Access*, *supra* note 187 (stating custom places high evidentiary burden on public). See generally *supra* part III.B.1.

The public trust doctrine, by contrast, does not require actual use by the public, let alone use continuous beyond the memory of man. See Cohen, *Economic Perspective*, *supra* note 202, at 257 (stating that bald assertion of set of communal interests now recognized as valuable can diminish private property rights and no compensation need be paid to those private property owners). Moreover, the doctrine's fluidity, constantly changing circumference, and its anachronistic, esoteric provenance may make the doctrine's use problematic in any given case. See, e.g., *City of Berkeley v. Superior Court*, 606 P.2d 362 (holding private property rights in submerged lands divested in favor of public trust). But see Justice Brennan's unpublished dissent drafted for *Nollan*, *supra* note 241 (arguing that historical provenance of doctrine and consistent national application is sufficient to deprive coastal landowner of any reasonable expectation of right to deny public access to ocean).

327. See, e.g., Freyfogle, *supra* note 210 (arguing that property law's basic messages about ownership are misguided insofar as they contradict the laws of nature).

328. See Rieser, *Ecological Preservation*, *supra* note 147.

329. Hunter advocates having the laws of nature, therefore, inform all of our social institutions. See Hunter, *Ecological Perspective*, *supra* note 167, at 316.

330. Fritsch states:

legal dogma to take into account the laws of nature has significantly threatened the environmental stability of these areas.<sup>331</sup>

Creating severable property interests in interrelated natural systems like surface and groundwater, or dividing single surface systems into discrete ownership units, like grazing permits, without considering the impact on the larger ecosystem, is inconsistent with the laws of nature.<sup>332</sup> "The boundaries that we draw, between, farm A and ranch B, carry no meaning in nature's terms. No coyote or egret reads our deeds; no percolating groundwater stops to ask permission to enter."<sup>333</sup> This inconsistency creates a conflict between the laws of property and the functions of natural systems, which has resulted in the destruction of many natural systems.<sup>334</sup>

Both public trust and custom can be applied to protect natural systems like coastal barrier beaches, the inter-tidal zone, or the tributary system of an inland lake.<sup>335</sup> Horizontal or vertical ownership entitlements are irrelevant to the reach of those doctrines. In that sense, the public trust doctrine comports more closely to how

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The basic insight of ecology is that all living things exist in interrelated systems; nothing exists in isolation. The world system is weblike; to pluck one strand is to cause all to vibrate; whatever happens to one part has ramifications for all the rest. Our actions are not individual but social; they reverberate throughout the whole ecosystem.

A. FRITSCH, SCIENCE ACTION COALITION, ENVIRONMENTAL ETHICS: CHOICES FOR CONCERNED CITIZENS 3-4 (1980), *quoted in* Hunter, *Ecological Perspective*, *supra* note 167, at 313-14.

331. Ecologists sound a note of urgency in their arguments for the need to reform legal and social institutions to better reflect an ecological perspective:

The immediacy of the environmental crisis does not afford us the luxury of waiting for the rest of mankind to make the radical paradigm shift to a Spinozistic-Leopoldian ethical posture. For the immediate future, Nature must be protected from the uncontroverted and the ecologically ignorant by a vast interlocking system of national and international law.

George Sessions, *Anthropocentrism and the Environmental Crisis*, HUMBOLDT J. SOC. REL. 71, 80 (1974), *quoted in* Hunter, *Ecological Perspective*, *supra* note 167, at 317.

332. Aldo Leopold's land ethic reminds us that "the individual is a member of a community of interdependent parts[,] the boundaries of which "include soils, waters, plants, and animals . . ." ALDO LEOPOLD, A SAND COUNTY ALMANAC 239 (1966), *quoted in* Hunter, *Ecological Perspective*, *supra* note 167, at 318.

333. Freyfogle, *supra* note 210, at 1279.

334. *See* Freyfogle, *supra* note 210, at 1278-83 (stating legal property boundaries are factually wrong and gravely pernicious to extent they separate man from nature).

335. *See supra* part III.B.2.a.

natural systems actually work than do the laws of private property ownership.<sup>336</sup>

The doctrinal foundations of both public trust and custom recognize land as part of a natural system on which we as a society depend, whether for the shellfish beds that provide a source of food or for the beaches that serve a socializing or educational purpose.<sup>337</sup> Lands protected by these doctrines perform a communal welfare function. Both doctrines erect a trust over that land such that the owner of lands affected by either doctrine holds those lands in "trust for the rest of Creation."<sup>338</sup> Under both custom and public trust, private property owners share fiduciary responsibility for their portion of the land to which these doctrines apply. Thus, a landowner cannot diminish the contribution her land makes to the public wealth by removing that land from the public trust or from public access.<sup>339</sup> As Freyfogle writes:

It is an error to suggest, as the law largely does, that how an owner treats a part of nature is his business alone. How a person deals with the land, given the linkages of nature, is public business, the concern of all Creation.<sup>340</sup>

J. Peter Byrne sees in the public trust doctrine a way to articulate a fiduciary relationship between present and future members of a community which receives spiritual and biological vitality from any undeveloped or agricultural land.<sup>341</sup> He credits the public trust doctrine with teaching landowners in some jurisdictions that

336. The Supreme Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988) recognized the interconnectedness of water-based habitat. *See supra* note 243. *See also* *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

337. *See supra* part III.B.2.b.

338. Freyfogle, *supra* note 210, at 1289-90.

339. This thought found legal expression in *Just v. Marinette County*, in which the court sustained a local ordinance requiring landowners to get a permit before engaging in activities in a wetland. 201 N.W.2d 761, 768 (Wis. 1972) (holding that owner of land has no absolute and unlimited right to change essential nature of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures rights of others). *See also* J. Peter Byrne, *Green Property*, 7 CONST. COMMENTARY 239, 242 (1990) (admiring this language for striking the "true green note"). *See* Hunter, *Ecological Perspective*, *supra* note 167, at 349-57, for a discussion of the significance of *Just* and its progeny.

340. Freyfogle, *supra* note 210, at 1281.

341. J. Peter Byrne, *Green Property*, 7 CONST. COMMENTARY 239, 244-45 (1990).



if they purchase land in highly desirable areas, such as along the oceanfront, they will suffer "some loss of tranquility."<sup>342</sup>

To the extent that the doctrines of public trust and custom have been informed by the laws of nature, they may prevent the destabilization of public expectations caused by countering the laws of nature.<sup>343</sup> An example of this occurred in the recent midwestern floods where the laws of private property, which enabled construction of homes in the flood plain, destruction of wetlands, diking of rivers, and stream channelization, clashed with the laws of nature resulting in disastrous loss of buildings and livelihood.<sup>344</sup>

To avoid destabilizing public expectations, the reasonableness of any landowner's expectations about her property should depend upon what public expectations are (1) recognized as being held within the trust and (2) capable of disappointment should they be defeated by private action.<sup>345</sup> One purpose of this Article has been to show that the public has an expectational interest in the ecological integrity of barrier beaches and wetlands.<sup>346</sup> This interest finds expression in the common law doctrines of public trust and custom, which in turn are grounded on the inherently public nature of these properties.<sup>347</sup>

Unfortunately, public and private expectations are not always in harmony. A theoretical understanding of the public's superior interest in this inherently public property<sup>348</sup> may founder on the reality of the landowner's justifiable frustration if results do not meet the landowner's expectations. A discussion of expectations necessarily depends upon the factors leading to them. However, the exact point at which owners can form private expectations about

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342. *Id.* at 248.

343. "For most of the modern era, the technological use of land has operated to end 'the existence of nature.'" Sax, *Understanding Lucas*, *supra* note 142, at 1443.

344. B. Drummond Ayres, Jr., *St. Louis Wins the Early Rounds As the Mississippi Does Its Worst*, N.Y. TIMES, July 19, 1993, at A1, B6.

345. Rieser, *Public Trust*, *supra* note 27, at 40.

346. *See supra* notes 128, 131, and 133.

347. Another function of the public trust doctrine, according to Sax, is to avoid the destabilizing changes brought about by environmental crises, such as the sudden decline in a species or destruction of a watershed. *See Sax, Historical Shackles*, *supra* note 325, at 188-89.

348. *See Hunter, Ecological Perspective*, *supra* note 167, at 311-13 (arguing that the public should have a right in the ecological integrity of land on which survival depends).

the right to use property is addressed neither by the *Lucas* Court nor by public trust scholars.<sup>349</sup>

[T]here comes a point at which courts simply cease to be sympathetic to owners' claims that their reasonable expectations are being sharply disappointed. That is, at some point the imposition of such restraints is no longer seen as sharply destabilizing for the land-development industry. One might say the same about the long line of wetland-protection cases. As such laws become more and more commonplace, wetlands owners will not be able to claim an expectational right to develop as they did in the past.<sup>350</sup>

The difficulty in finding and maintaining that point for the individual landowner is made worse by the changing nature of the public's expectations about the value of certain property.<sup>351</sup> Nowhere has this been more true than in the field of environmental law,<sup>352</sup> as

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349. A post-*Lucas* decision by the Court of Federal Claims has fixed the time at which reasonable investment-backed expectations are created as the time at which the claimant takes title to her property. *Presault v. United States*, 27 Cl. Ct. 69 (1992) (holding that conversion of railroad right-of-way trail under National Trails System Act did not effect a taking because owners' reversionary interest in land had long been extinguished).

[G]iven long-standing, pervasive and specific federal limitations on rights created by state law in respect of property burdened by a private easement for a public purpose, a landowner could [not] have developed a historically rooted expectation of compensation for postponement of those rights when state law does not recognize the rights independent of federal regulation.

*Id.* at 89.

350. Sax, *Historical Shackles*, *supra* note 325, at 188–89 n.13. The courts have consistently held claimants responsible for knowing about the status of restrictions on the use of their property. *See, e.g.*, *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (stating that chemical company could not have formed reasonable investment-backed expectation about the confidentiality of data submitted under statute allowing release of information to public). *See also* *Ciampitti v. United States*, 22 Cl. Ct. 310, 321 (1991) (“[Where claimant knew he had to obtain wetlands permits and permits would be difficult to get], to find that the Federal Government has taken a property interest in the form of a distinct, reasonable, investment-backed expectation, would, in this instance, turn the Government into an involuntary guarantor of Ciampitti’s gamble.”).

351. Even the *Lucas* Court recognized that landowners “necessarily expect” that their expectational interests may “be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers,” *Lucas v. South Carolina Coastal Council*, 112 S. Ct., 2886, 2899 (1992), and that “changed circumstances or new knowledge may make what was previously permissible no longer so.” *Id.* at 2900.

352. Lewis Thomas states:

The oldest, easiest-to-swallow idea was that the earth was man’s personal property, a combination of garden, zoo, bank vault, and energy source, placed at our disposal to be consumed, ornamented, or pulled apart as we wished.

illustrated by the expanding scope of the public trust doctrine. Changes in public expectations are brought about by changing socioeconomic priorities and new information.<sup>353</sup> These changes in public expectations can cause serious dislocations in private expectations.<sup>354</sup>

It is in the very nature of common law doctrines to expand and change over time to reflect changing social mores and expectations. The *Lucas* Court, by relying on common law doctrines to restrict the circumstances in which government may regulate the activities of private landowners, has increased somewhat the opportunities for frustrating those landowners' expectations.<sup>355</sup> At the

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The betterment of mankind was, as we understood it, the whole point of the thing. Mastery over nature, mystery and all, was a moral duty and social obligation.

In the last few years we were wrenched away from this way of looking at it, and arrived at something like general agreement that we had it wrong. We still argue the details, but it is conceded almost everywhere that we are not the masters of nature that we thought ourselves; we are as dependent on the rest of life as are the leaves or midges or fish. We are part of the system. One way to put it is that the earth is a loosely formed, spherical organism, with all its working parts linked in symbiosis. We are, in this view, neither owners nor operators; at best, might see ourselves as motile tissue specialized for receiving information—perhaps, in the best of all possible worlds, functioning as a nervous system for the whole being.

LEWIS THOMAS, *THE LIVES OF A CELL* 103–04 (1974).

353. The evolution in the public's attitude toward wetlands is illustrative of this point. Before enactment of the Clean Water Act, the prevailing attitude was that wetlands were waste lands. In fact, the historical and institutional preference had been to drain wetlands and to convert them to a higher societal use. *See, e.g.*, The Swamp Land Act of 1849, ch. 87, 9 Stat. 352; The Swamp Land Act of 1850, ch. 84, 9 Stat. 519; The Swamp Land Act of 1860, ch. 5, 12 Stat. 3 (providing subsidies for the draining of swamps in several states). Hope Babcock, *Federal Wetlands Regulatory Policy: Up to Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307, 311 n.20 (1991). Now wetlands, because the public knows more about their functions and is faced with a growing shortage of them, are considered among our most valuable natural systems; as a result, they are protected by a web of prohibitive federal, state, and local laws. *See, e.g.*, 33 U.S.C. § 1344 (1986) (wetlands permitting provisions of the Clean Water Act); 16 U.S.C. § 3901 (1986) (establishment of National Wetlands Priority Conservation Plan).

354. Determining the reasonableness of a landowner's expectations about her property use rights under these circumstances may be a matter of determining whether she had notice, at the time she acquired the property, of these common law doctrines as well as any changes in their scope. *See Rieser, Public Trust, supra* note 27, at 40 (arguing focus should be on whether legislature, courts, administrative agencies, and public sent signal to private owners of broader definition of public interest). *See also Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (stating property owners were on notice that state had claimed or could claim ownership interest in submerged tidelands).

355. In his desire to have ecological concerns drive takings jurisprudence, Professor Hunter expects landowners to understand both that rule changes affecting their property will act retrospectively and that the marketplace will make adjustments to take care of any

same time, *Lucas* has aligned takings jurisprudence more closely with the public's expectations about inherently public property, such as wetlands and barrier beaches, and with the laws of nature, which could exert a stabilizing influence on property law.

## V. CONCLUSION

*Lucas*, despite its rhetoric and the Cassandra-like cries of its dissenters, may influence takings jurisprudence less than its authors intended and early critics feared. Ironically, the *Lucas* decision may make it *more* difficult for takings claimants to successfully strike down environmental regulations. The doctrines of custom and public trust could thwart the decision's preference for private property rights by underscoring the public's superior right to access and use certain resources, but this is not as destabilizing as it sounds because both common law doctrines are a reflection of public expectations.

The most significant change *Lucas* has made in takings jurisprudence is to shift its focus to the states. The content of the new takings paradigm established in *Lucas* will be defined by each state's common law of nuisance and property.<sup>356</sup> This presents a unique opportunity to merge the laws of ecology with the laws that govern the use and disposal of property. Even with the possibility of significant state-to-state variation, one would nevertheless expect common holdings to emerge affirming the need to preserve critical ecosystems like wetlands and barrier beaches because of public understandings about the importance of those systems. How successfully the new common law takings jurisprudence will now fulfill property owners' expectations about their bundle of rights in the twentieth century awaits *Lucas*' state progeny.

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unfairness that results. See Hunter, *Ecological Perspective*, *supra* note 167, at 381 (advocating that anyone investing in real estate should know that certain undeveloped lands invite special regulation).

356. The extent to which the Court will allow the lower courts to develop background principles of common law freely and to mediate the clash of expectational interests remains to be seen. At least one scholar worries that their evolution "will be hemmed and hobbled by federally enforced 'objectively reasonable application of relevant precedents,'" which in turn might emerge into "a supervening federal law of *damnum absque injuria* (loss without injury) to protect private owners' right to engage in harm-producing uses of land." Humbach, *Nuisance*, *supra* note 9, at 16.